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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench:

WITH TABLES OF THE NAMES OF THE CASES ARGUED AND CITED, AND THE PRINCIPAL MATTERS.

BY

JOHN LEYCESTER ADOLPHUS, OF THE INNER TEMPLE,

AND

THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE,

ESQRS. BARRISTERS AT LAW.

VOL. IV.

CONTAINING THE CASES OF MICHAELMAS, HILARY, AND EASTER TERMS, IN THE SIXTH YEAR OF WILLIAM IV. 1835-6.

LONDON:

PRINTED FOR SAUNDERS AND BENNING,

(SUCCESSORS TO J. BUTTERWORTH AND SON,)

43. FLEET-STREET.

1837.

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JUN 20 1901

LONDON:
Printed by A. SPOTTISWOODE,
New-Street-Square.

JUDGES

OF

THE COURT OF KING'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. THOMAS LORD DENMAN, C. J.
Sir JOSEPH LITTLEDALE, Knt.
Sir JOHN PATTESON, Knt.
Sir JOHN WILLIAMS, Knt.
Sir JOHN TAYLOR COLERIDGE, Knt.

ATTORNEY GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR GENERAL.

Sir ROBERT MOUNSEY ROLFE, Knt.

A

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ERRATA.

Page 283. line 5. for "*Higgs*," read "*Hobbs*."
305. line 11. for "mortgagor," read "mortgagee."

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ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

AND

UPON WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

In the Sixth Year of the Reign of WILLIAM IV.

The Judges who usually sat in Banc this term were,

Lord DENMAN C. J.	WILLIAMS J.
PATTESON J.	COLERIDGE J.

DOE on the several Demises of SPILSBURY and Others *against* Sir FRANCIS BURDETT, Baronet, and Others.

DOE on the same Demises *against* SKYNNER and Others.

THESE were actions of ejectment, the first for lands in *Derbyshire*, the second for lands in the town and county of *Nottingham*. On the respective trials, in 1834, before

Lands were limited to such uses, &c., as *L.* should appoint by her last will and testament in writing, to be by her *signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses.* *L.* signed and sealed an instrument, containing an appointment, commencing

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before *Tindal* C. J. at the *Derbyshire* Lent Assizes, and *Littledale* J. at the *Nottingham* Lent Assizes, verdicts were found for the plaintiffs, subject to the opinion of this Court upon two cases. The facts stated, so far as they are material to the judgment, were as follows.

By a settlement, made (4th and 5th *December*, 1787) upon the marriage of *Lydia Henning Ward* with *William Augustus Skynner*, certain of the lands in question were limited (after certain uses and trusts, which had failed to take effect, or had been exhausted), after the decease of the said *Lydia Henning Ward*, to the use and behoof of such person and persons, for such estate and estates, upon such trusts, and to and for such ends, intents, and purposes, as she the said *L. H. W.*, whether covert or sole, and notwithstanding her present intended or any future coverture, by her last will and testament in writing, or any writing purporting to be, or in the nature of, her last will and testament, or by any codicil or codicils thereto, *to be by her signed, sealed, and published in the presence of, and attested by, three or more credible witnesses*, should give, devise, direct, limit, or appoint; and, for want of such gift, &c., then over, as stated in the case. Other lands were also settled, subject to another power, which, as far as regards the point here decided, was precisely the same as that already set out.

Lydia Henning Skynner (formerly *Ward*) died 30th *September* 1789. She left at her death an instrument in writing, set out in the case, of which the following are the material parts: — "I, *Lydia Henning Skynner*, do publish and declare this to be my last will and testament. I appoint &c." (the case then set out the appointments in the will, which concluded thus), "I declare this only to be

commencing thus: — "I, *L.*, do publish and declare this to be my last will and testament;" and ending thus: — "I declare this only to be my last will and testament. In witness whereof I have to this my last will and testament set my hand and seal the 12th day &c." The attestation was as follows: — "Witness *C. B.*, *E. B.*, *A. B.*:" Held, a good execution of the power, on the face of the instrument.

The will being more than thirty years old: Held that, on production of it in the above form, the fact of the attestation was sufficiently proved, though one witness was still alive and was not called.

Quære, Whether in general publication be essential to the validity of a will?

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be my last will and testament. In witness whereof I have to this my last will and testament, contained in one sheet, set my hand and seal, the 12th day of *September*, in the year of our Lord one thousand seven hundred and eighty-nine.

Lydia Henning Skynner. (*L. S.*)

Witness *Charles Ball.*

Elizabeth Ball.

Ann Ball."

Ann Ball is still alive, and was not examined at the trial.

The case then stated certain Chancery proceedings; in the course of which, depositions by *Charles Ball* and *Elizabeth Ball*, as to the execution of the will, were filed. Certain proceedings at a copyhold court, and divers conveyances, were also stated in the case. All these were received in evidence at the trial, subject to objections to their admissibility.

The several defendants in each case claimed under the appointments in the above will: the lessors of the plaintiffs under interests which were to arise in default of appointment.

The cases were argued together in *Hilary* term last (*a*).

Preston for the plaintiffs. The power is not well executed. The attestation should specify the fulfilment of the requisites pointed out by the deed of 1787, which are the signing, sealing, and publishing in the presence of, and attested by, three credible witnesses. Attestations of the execution of a power, which derives its validity solely

(*a*) *Tuesday, January* 27th, before Lord *Denman* C. J., *Littledale, Williams,* and *Coleridge* Js.

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from compliance with the terms under which the power is created, and where the attestation is required in order that the witnesses may pledge themselves to the fact that the requisites have been complied with, rest upon different principles from attestations under the Statute of frauds, where it is necessary only that the names of the witnesses, who may be called to explain the transaction, should appear. The requisites here are as important as the delivery of a common deed. It will be said, however, that the will itself contains a declaration that the requisites were complied with. But that is only the language of the testatrix, used before the act required is done: the preparation of a will is very different from the publishing, and is not what the witnesses attest. In fact they here attest nothing. In *Buller* v. *Burt* (*a*), before Sir *John Leach*, M. R., a general attestation was held insufficient: but the case turned on a point which does not occur here. *Stanhope* v. *Keir* (*b*) (where the marginal note does not represent the case accurately), *Moodie* v. *Reid* (*c*), *Doe dem. Hotchkiss* v. *Pearce* (*d*), *Doe dem. Mansfield* v. *Peach* (*e*), and *Wright* v. *Barlow* (*g*), shew that the general attestation here is not sufficient. *Wright* v. *Wakeford* (*h*) is to the same effect; and the decision of the Court of Common Pleas in that case accorded with the opinion which had been previously expressed by Lord *Eldon* (*i*), explaining at the time his judgment in *M'Queen* v. *Farquhar* (*k*). It is true that, in ordinary cases, a published will, like a deed delivered, operates of itself; the attestation merely verifying the

(*a*) Cited from MS. See p. 15, post.
(*b*) 2 *Sim. & Stu.* 37.
(*c*) 1 *Mad.* 516. 7 *Taunt.* 355.
(*d*) 6 *Taunt.* 402.
(*e*) 2 *M. & S.* 576.
(*g*) 3 *M. & S.* 512.
(*h*) 4 *Taunt.* 213.
(*i*) *Wright* v. *Wakeford*, 17 *Ves.* 454.
(*k*) 11 *Ves.* 467.

execution.

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execution. But the case of a power is different, for the reasons before given. [He then proceeded to argue other points of the case: but the judgment renders it unnecessary to enter into these.]

Sir *W. W. Follett*, Solicitor General, Sir *John Campbell*, *Waddington*, and *G. T. White*, for the several defendants. The general attestation is sufficient. It is true that, where the attestation specifies the fulfilment of some requisites only, this has been held an insufficient attestation as to those not specified, on the principle that expressio unius est exclusio alterius. This explains many of the cases which appear in favour of the plaintiffs. But here the attestation is general. The word attestation simply means a witnessing of an act. Suppose a statute (where the wording cannot be considered less precise than in a power) requires an instrument to be sealed and attested; all that it is requisite for the witnesses to put in writing is their names: the other formalities are inferred. Indeed the specification of a fact in the attestation is of so little importance, that it does not supersede the necessity of calling the witness to prove the fact, if essential. [*Coleridge* J. Do you say that it is not necessary for the witnesses to sign?] They need only verify; that must be by signature, or putting marks. [Lord *Denman* C. J. It seems to have been assumed, in *Doe dem. Mansfield* v. *Peach* (*a*), that more was necessary.] The question, whether a simple verification, without specifying any particulars, would suffice, did not arise there. The Statute of frauds, 29 *C. 2. c. 3. s. 5.*, requires that a devise of lands shall

(a) 2 *M. & S.* 576.

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be in writing, and signed, and attested and subscribed in the devisor's presence by three credible witnesses. It is not necessary, under this act, that the attestation should specify the performance of the formalities. In *Ellis* v. *Smith* (*a*) a declaration by a devisor before the three subscribing witnesses, that a document was his will, was held equivalent to a signing by him before them. From the judgment in *Hands* v. *James* (*b*) it appears that, under this section, neither the inserting nor omitting, in the attestation, of the performance of a formality, is conclusive; the question of fraud goes to a jury. *Brice* v. *Smith* (*c*) and *Croft* v. *Pawlet* (*d*), are to the same effect; and other cases are collected in *Westbeech* v. *Kennedy* (*e*). Then, is the case of a power distinguishable from a case under sect. 5. of the Statute of frauds? Sir *Edward Sugden* (*g*) puts them on the same footing, and dissents from the strict rule adopted in the case of powers. In *M'Queen* v. *Farquhar* (*h*) the power did not require attestation, but only that the execution should be in the presence of the witnesses; and it was held not necessary that the attestation should specify the fact. In *Wright* v. *Wakeford* (*i*) Lord *Eldon* distinguished the case from *M'Queen* v. *Farquhar* (*e*), and left the general question, as to the necessity of specifying the formalities in the attestation, in doubt, treating it as new. The Court of Common Pleas (*k*) afterwards decided that the execution was not good; and Lord *Eldon*, of course,

(*a*) 1 *Ves.* jun. 11. (*b*) 2 *Com. Rep.* 532.
(*c*) *Willes*, 1. (*d*) 2 *Str.* 1109.
(*e*) 1 *Ves.* & *B.* 362. (*g*) 1 *Sugd. Powers*, 317. 6th ed. (1836).
(*h*) 11 *Ves.* 467. (*i*) 17 *Ves.* 454.
(*k*) *Wright* v. *Wakeford*, 4 *Taunt.* 213.

could

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could not require the purchaser to complete the purchase, although he might have dissented from the judgment in the court of Common Pleas. Now it will be found that all the cases, in which attestations have been held incomplete for not specifying the formalities, rest upon *Wright* v. *Wakeford* (*a*). But there the attestation did specify the performance of a part of the formalities: the case therefore falls within the distinction first pointed out. The same may be said of *Wright* v. *Barlow* (*b*), and *Doe dem. Hotchkiss* v. *Pearce* (*c*). *Stanhope* v. *Keir* (*d*) was decided by Sir *John Leach*, when Vice-Chancellor: but he afterwards, when Master of the Rolls, laid down a different doctrine in *Buller* v. *Burt* (*e*), and held that the attestation shewed that all had been done in the presence of the witnesses, which was stated in the body of the deed. That is consistent with common sense; the case is as if the witnesses had heard the party say, "I publish," and had signed as witnesses. In *Moodie* v. *Reid* (*g*), cited in that case, the question turned on the meaning of the word "published." There, the body of the will specified the signing, but not the publication; and *Gibbs* C. J. said, "the witnesses have clearly attested the signing," though the attestation specified nothing. Now here the body of the will contains an assertion of the performance of all the requisites. It must be contended, on the other side, that the witnesses attest nothing: if they attest anything they attest all that is stated in the will. Admitting, therefore, that the cases, where there is a partial specification in the at-

(*a*) 4 *Taunt.* 213.
(*b*) 3 *M. & S.* 512.
(*c*) 6 *Taunt.* 402.
(*d*) 2 *Sim. & Stu.* 37.
(*e*) Cited from MS. See p. 15, post.
(*g*) 7 *Taunt.* 355.

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testation, are rightly decided (although they seem opposed to the decisions on sect. 5. of the Statute of frauds), the present case is precisely within the rule in *Buller* v. *Burt* (*a*); and *Ward* v. *Swift* (*b*) is upon the same principle. The retrospective statute of 54 *G.* 3. *c.* 168. cannot be considered a legislative declaration that the law requires a specification of the formalities in the attestation; it was passed merely to remedy the omission of the fact of signing in attestations already made, and it treats the law as doubtful.

Preston in reply. The argument on the other side is, that the attestation has the same effect as if the words used in the body of this will were inserted in the attestation. If that were so, the question in *Ward* v. *Swift* (*b*) could not have arisen; for Lord *Lyndhurst* (*c*) there clearly considered that the publication was asserted in the will.

Cur. adv. vult.

In this term (*November* 24th), Lord Denman C. J. delivered the judgment of the Court. After reading the material points of the settlement of 1787, and the will, his Lordship proceeded as follows.

The defendants claim under that will, contending that it is made in pursuance of, and is a due execution of, the power in the marriage settlement. The plaintiff says that it is not a due execution of the power in the marriage settlement; and he claims under the subsequent limitation of the settlement. And one

(*a*) Cited from MS. See p. 15, post.
(*b*) 1 *Cr.* & *M.* 171. *S. C.* 3 *Tyrwh.* 122.
(*c*) 1 *Cr.* & *M.* 174. 3 *Tyrwh.* 125.

question

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question in the special case is, whether that will be a due execution of the powers in the marriage settlement.

At the beginning of the will, *Lydia Henning Ward* publishes and declares that to be her last will and testament. At the end of it she declares that only to be her last will and testament, and says, "In witness whereof I have, to this my last will and testament," "set my hand and seal the 12th day of *September*, in the year of our Lord 1789." And then there is signed the name *Lydia Henning Skynner*, and a seal opposite to it.

On the face of the instrument, therefore, it appears that, at the beginning of the will, she publishes it, and at the end she declares it to be her last will and testament, and that she puts her hand and seal to it; and there is her hand and seal in fact actually put to it. Therefore, on the face of the instrument itself, it purports to be her will, and to be signed, sealed, and published by her, and her name and seal are affixed.

It was proved by the depositions of *Charles Ball* and *Elizabeth Ball*, now deceased, as stated in the case, that the will was signed, sealed, and published by *Lydia Henning Skynner*, in the presence of *Charles Ball*, *Elizabeth Ball*, and *Ann Ball*. Objections were made that these depositions, in this stage of the proceedings, and considering the parties to the suit, were not admissible in evidence; and also that, there being one of the witnesses who was alive, that witness ought to have been called. We think these objections, if well founded on general principles in themselves, are not material in the present case, for the reasons which will be given hereafter.

But then, as the settlement creating the power requires

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quires the signing, sealing, and publishing, not only to be in the presence of, but also to be *attested* by, three or more witnesses, unless they attest the signing, sealing, and publishing, the mere fact of its being signed, sealed, and published, in their presence, would not support the instrument.

The plaintiff says, that the attestation ought to have expressed that the will was signed, sealed, and published, by Mrs. *Skynner* in the presence of the three witnesses, and that, it not being so expressed, the will is a void execution of the power. On the other hand the defendants say that, whatever might have been the case if some of the requisites of signing, sealing, and publishing had been expressed in the attestation, and it had been silent as to the others, yet this, being a general attestation without going into any particulars, must be taken to affirm that all has been done in the presence of the witnesses which is stated in the body of the will: and, as it is there stated that the will was signed, sealed, and published, the attestation must be taken to attest that all those things have been done.

But it may be said, here are three ingredients, which together make one entire complex substance, which must be verified in toto; and, though each taken by itself is proved, yet, as it does not express that the attestation applies to the whole, it may apply to one or two, or to all the three ingredient parts, and it is uncertain to which it refers, and, therefore, it is uncertain and must be rejected altogether. And several cases on this point are referred to, none exactly *ad idem*, yet containing a sufficient body of legal reasoning and authority to make the principle of these cases applicable to the present.

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The case most relied upon is that of *Wright* v. *Wakeford*, which first came on in the Court of Chancery (*a*), on a bill filed for a specific performance of an agreement for the sale of an estate; wherein Lord *Eldon* directed a case to be made for the opinion of the Court of Common Pleas, which was done; and it is reported in *Taunton* (*b*). *Mansfield* C. J. was of opinion that the attestation must be understood to apply to the signing, as well as to the sealing and delivery; but the other judges, *Heath*, *Lawrence*, and *Chambre*, were of opinion that the signature of the parties was not comprehended in the words made use of in the attestation. The principle of this decision was adopted by the whole Court of King's Bench in a subsequent case of *Doe dem. Mansfield* v. *Peach* (*c*), and in *Wright* v. *Barlow* (*d*), and by the Court of Common Pleas in *Doe dem. Hotchiss* v. *Pearce* (*e*).

The present case, in our opinion, differs from these, which may have been decided on the ground that, the attestation embracing part but not the whole, the maxim *expressio unius est exclusio alterius* is to be applied to them.

Before the case of *Wright* v. *Barlow* (*d*) an act of parliament (54 *G.* 3. *c.* 168.) had passed, to remedy the inconvenience and mischief which might have occurred in consequence of the decision of *Wright* v. *Wakeford* (*b*), and the other cases: that act had only a retrospective effect: but, if cases similar to *Wright* v. *Wakeford* (*b*), and the other cases, were now to be considered, that act of parliament might be contended to

(*a*) 17 *Ves.* 454.
(*b*) 4 *Taunt.* 213.
(*c*) 2 *M.* & *S.* 576.
(*d*) 3 *M.* & *S.* 512.
(*e*) 6 *Taunt.* 402.

operate

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operate as a legislative declaration that those cases were rightly decided. But, though the act was mentioned in *Wright* v. *Barlow* (*a*), it did not draw forth any opinion from the Court that it had the effect of such a legislative declaration.

But there is another class of cases, where the attestation has been general, as in the case here, and their application to the present case must now be considered.

In the case of *Moodie* v. *Reid*, the Vice-Chancellor (*b*) directed a case to be sent for the opinion of the Court of Common Pleas, which was done, and the case is reported in *Taunton* (*c*). By a marriage settlement, trustees were to stand possessed of certain monies, in trust for such persons, and for such intents and purposes, and in such manner, as *Sarah Crowther*, by any deed or instrument in writing to be by her sealed and delivered in the presence of two or more credible witnesses, or by her last will and testament in writing, to be by her signed and published in the presence of, and attested by, two or more credible witnesses, should direct or appoint. The execution of the power was by the will of *Sarah Moodie*, who, after expressing a hope that no means would be taken to set aside her bequests, even though it should be found that due forms were wanting to render them properly valid according to law, concluded thus: —

"These my last bequeaths signed by me this 4th day of *February*, 1812.

Sarah Moodie.

Witness *A. B.*

C. D."

(*a*) 3 *M.* & *S.* 512. (*b*) 1 *Mad.* 516. (*c*) 7 *Taunt.* 355.

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The two witnesses to the will were examined, and stated that *Sarah Moodie* signed or subscribed her name in the presence of the witnesses: and one of them further stated that, from what *Sarah Moodie* said in her presence and hearing on that occasion, the deponent understood that the paper writing was her will: and another witness said that, from the expressions made use of by the said *Sarah Moodie* at the time of her signing the said writing, she understood that such writing was the will of *Sarah Moodie*. The question was, whether this will was a due execution of the power? Lord Chief Justice *Gibbs* makes some remarks upon this case: he says, "here the power is to be exercised by a will signed and published. Therefore there must be some publication here: the will must be signed, published, and attested; and there must therefore be some attestation here, of signing and publication." He goes on to add, "Though the most respected late Chief Justice of this Court differed from the other judges in *Wright* v. *Wakeford* (*a*), it is established by that case, that the witnesses must attest everything that is necessary for the execution of the power. Here the witnesses have clearly attested the signing; the question is, whether they have attested the other formality, of publication, in attesting the signing. If the act of the testatrix in calling on the witnesses to attest her will, be a publication of it, then their attesting that she signed it, attests her publication also, because they attest that by which she publishes it."

In that case, on a general form of attestation, the power was held not to be well executed. But, from the

(*a*) 4 *Taunt.* 213.

language

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language of the Chief Justice *Gibbs*, it seems as if the decision had been on the ground that, in fact, there was no publication, which the power required; but, if there had been in fact a publication, the general form of attestation would have been sufficient. At the same time, however, taking the actual decision and the reasons altogether, we think that it does not lead us to any clear conclusion as applicable to the present case.

Having cited this case, we feel that we ought to notice an opinion expressed by Lord Chief Justice *Gibbs*, that "a will," as such, requires no publication. He says, "be publication what it may, a will may be good without it." The opinion thus expressed, of so very eminent a judge as Lord Chief Justice *Gibbs*, and more particularly when he called on the bar to say what publication was, and he did not wonder that he had no answer, might certainly be taken to imply that such was the law. We do not at all say whether we think it is law or not, but only that, having cited the case, we do not mean to be taken to acquiesce in that opinion, and we leave the matter as it was before that opinion was expressed.

The next case of a general attestation is that of *Stanhope* v. *Keir* (*a*). The power was for *Eugenia Stanhope*, "by her last will and testament in writing, or any codicil or codicils to the same, signed and published by her in the presence of and attested by three or more credible witnesses," to appoint, &c. The execution of the power was by a will in the following amongst other words:—

"I *Eugenia Keir*, formerly *Eugenia Stanhope*, hereby give and bequeath all that," &c. &c.; "and this is my

(*a*) 2 *Sim. & Stu.* 37.

last

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last will and testament, made and signed in the year of our Lord 1818, on the 19th day of *November*," &c.

(Signed) *Eugenia Keir* (L. S.)

In the presence of" *A. B.*

C. D.

E. F.

To a bill filed to have a declaration made as to the property, on the ground that the will was not executed according to the power, the defendant pleaded the will, and set forth the will and attestation, and averred that the will was signed and published in the presence of and attested by three witnesses, &c. &c. On the argument for the bill it was insisted that the appointment was not duly made by the will. It was admitted that the power required that the witnesses should attest the signing and publishing of the appointment, but insisted that the declaration with which the will concluded was in effect a publication, as well as a signing, and that the witnesses, by adding their names to this declaration, attested both facts. The Vice-Chancellor, Sir *John Leach*, said he could not assume more from the attestation than that they saw Mrs. *Keir* sign the instrument, and overruled the plea.

Whether or not we entirely agree with the Vice-Chancellor's observations in this case, we must remark that, though the attestation was general, it immediately follows, and may be taken as adopting, a statement by the testatrix that the will was signed by her, not signed and published, in the terms of the power.

It is to be observed that Sir *John Leach* was the Master of the Rolls who decided *Buller* v. *Burt*, which we are now about to mention.

In the case of *Buller* v. *Burt*, which was heard before the

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the Master of the Rolls, (Sir *John Leach*) on the 25th of *February* 1829, which is not reported, but a copy of which case has been furnished to us, Mrs. *Louisa Smith*, a married woman, being by settlement empowered to dispose of certain personal property by any deed sealed and delivered in the presence of and attested by two or more credible witnesses, executed an instrument purporting to be a disposition of part of that property in favour of the defendant *Burt*. This instrument concluded with the following words: —

"Signed and sealed at *Cotton* aforesaid, this 19th day of *September*, in the year of our Lord 1813, by *L. Smith*, (L. S.)

Witness, *John H. Burt.*

Hannah Bowles."

The Plaintiffs by their bill alleged that the instrument of the 20th of *September* 1813 had never been *delivered*, and that, even if it had been delivered, it was not a due execution of the power. The defendant *Burt*, who claimed under the appointment, swore that he believed that the instrument had been delivered by Mrs. *Smith* to his father *J. H. Burt*, among whose papers it had been found. The only question argued at the hearing was, whether the instrument was a due execution of the power?

The Master of the Rolls (Sir *John Leach*), said, "the attestation of the witnesses being considered as a part of the appointment, it must follow that when the words, '*witnesses*,' without more, is used in the attestation, it affirms that all has been done in the presence of the witnesses which is stated in the body of the deed. Here, in the body of the deed, it is stated to be signed and sealed, but it is not stated to have been *delivered*; and,

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and, as the general word 'witnesses' can affirm no more than the deed states, there is in this case no attestation of that essential part of that which is required for the due execution of the power, the *delivery* of the deed; the power therefore is not well executed." The Master of the Rolls goes on to say, "the case of *Moodie* v. *Reid* (*a*) is in principle a complete authority for this decision." He adds, "the difference in circumstances between the two cases is, only, that there the word '*published*' was omitted in the body of the deed, and here the omission is of the word '*delivered*.'"

In this case, therefore, the general form of attestation was held not sufficient to make the instrument a good execution of the power; but the reason is very satisfactorily explained in the judgment of the Master of the Rolls, in which judgment we fully acquiesce.

The latest reported case on this subject is *Ward* v. *Swift* (*b*). And there, under indentures of lease and release, a power was given to *Mary Swift* to appoint, as she by any deed, &c., or by her last will and testament to be by her duly executed and published under her hand and seal, in the presence of, and to be attested by, three or more credible witnesses, should direct, limit, or appoint, &c. And, on the 5th of *August* 1801, the said *Mary Swift* signed, sealed, and delivered, as and for her last will and testament, an instrument, of which the signature and attestation are as follows: —

"In witness whereof I have set my hand and seal hereto, this 5th day of *August*, A. D. 1801, in the presence of the under written,

Mary Swift." (L. S.)

(*a*) 1 *Mad.* 516. 7 *Taunt.* 355.

(*b*) 1 *Cr. & M.* 171. *S. C.* 3 *Tyrwh.* 122.

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"Signed, sealed, and delivered this 5th day of *August* 1801, as the last will and testament of the said testatrix, *Mary Swift*, who, in her presence, and in the presence of each other, have put our names as witnesses thereof.

H. F.
I. G.
R. F."

On the trial of an issue, the jury found that *Mary Swift* signed, sealed, and delivered the instrument as her last will and testament, in the presence of the three witnesses who attested the execution. The Court of Exchequer, on a case reserved, certified that it was a due execution of the power. The main question seems to have been, whether there was a publication of the will. This case was much relied upon for the defendants. We do not feel that it operates farther than to show that the precise words of the power need not be pursued in the attestation, but that an attestation containing equivalent words may be good.

Here the power requires that the will should be signed, sealed, and published, in the presence of, and be attested by, three or more witnesses. The will, on the face of it, has all the requisites which the power requires. It purports to be published, and to be signed and sealed; and the attestation is a general one, and which, we are of opinion, in the language of the Master of the Rolls in *Buller* v. *Burt* (*a*), affirms that all has been done in the presence of the witnesses which is stated in the body of the instrument. And, therefore, upon the form of the instrument, we are of opinion that it is a good execution of the power.

(*a*) Antè, p. 15.

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Our principal remarks hitherto have been on the attestation; but, besides the attestation, it is necessary to have the fact proved by evidence, that it was signed, sealed, and published, in the presence of three or more witnesses.

We before stated that the depositions were objected to, on the ground that depositions, taken under the circumstances these were, could not be received in evidence; and also that, one of the subscribing witnesses being alive, that witness ought to have been called, notwithstanding the case of *Wright* v. *Doe dem. Tatham* (*a*); but we said these objections were immaterial for the reasons we should afterwards, and which we now, give.

The will is more than thirty years old, and therefore proves itself, without calling any witnesses, even were they all alive.

But then, on the will being put in, it must appear to be witnessed in such a way as proves that, on the face of it, it was regularly executed according to the power; and, as we are of opinion that the attestation goes the whole length, as far as the mere attestation goes, that all the requisites of the power were complied with, it therefore purports, on the face of it, to have been executed with all the requisites, and it then becomes an instrument which proves itself, just as much as any other instrument of that age, whether deed, or will, or other instrument, proves itself.

Something was said in argument respecting the Statute of Frauds, which requires all devises of lands to be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and to be attested and subscribed in the presence of the said devisor by three or more cred-

(*a*) 1 *A.* & *E.* 3.

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ible witnesses; and there is no doubt whatever but that an attestation in the present form would, both on principle and decided cases, be sufficient to satisfy the words of the Statute of Frauds. All that the statute requires to be done by the testator himself is, that he should *sign* the will; and one may call that the statutory power or direction; and then, if it be in fact signed, and witnesses put their names as witnesses to a document with the signature before their eyes, and that is all that the statute requires them to attest, no doubt, one would suppose, could ever be entertained that that was an attestation of the signing. But, as the power in this case requires other things to be attested besides the signing, we think it requires more discussion and consideration than would arise on the Statute of Frauds; and therefore, though, as far as it goes, the attestation under the Statute of Frauds may assist the decision, something more is requisite to enable us to come to the conclusion we have done.

The special case presents other points for our consideration, as to the effect of the proceedings in the Court of Chancery and the copyhold court, and the fines. But, in the view we have taken of the case, those points need not be noticed.

Upon the whole of the case, we are of opinion that there must be judgment for the defendants.

The same question that we have been considering arises also in the case of *Doe dem. Spilsbury and another* v. *Skynner and others*; and in that case also there must be judgment for the defendants.

Judgment for the defendants in each case (*a*).

(*a*) See *Pearse* v. *Morrice*, 2 *A.* & *E.* 84.

WILLIS and Another, Assignees of NORCLIFFE, a Bankrupt, *against* The Governor and Company of the Bank of ENGLAND.

Giving cash for a bank post bill is a payment within the protection extended by stat. 6 G. 4. c. 16. s. 82. to "all payments really and bonâ fide made" to any bankrupt before the commission.

TROVER for three bank post bills. Plea, the general issue. At the trial before *Alderson* B. at the *Lancaster* Spring Assizes, 1834, the plaintiffs had a verdict for 1500*l.*, subject to the opinion of this Court on the following case:—

Charles Norcliffe, before his bankruptcy, carried on trade at *Liverpool* as a dealer in zinc. On the 2d of *March* 1833, Messrs *Blackstock* and *Bunce*, solicitors in *London*, received on account of the said *C. Norcliffe* 1600*l.*, which, on the same day, they paid to the Bank of *England*, and obtained from the Bank three bank post bills for 500*l.* each (which are those in question), and one for 100*l.*, all dated *March* 2d 1833, payable to

N. committed an act of bankruptcy, and on the same day absconded with two 500*l.* bank post bills drawn in *London*, payable to himself, which he afterwards indorsed in blank. At *Gloucester*, where a branch bank of the Bank of *England* is established under stat. 7 *G.* 4. *c.* 46. *s.* 15., he delivered the bills to *S.*, saying he wanted gold for them. *S.*, who was known at the branch, delivered them to the agent there, and received 1000*l.* in gold, first indorsing them, at the agent's desire, to the Governor and Company of the Bank of *England*. *S.* paid over the whole 1000*l.* to *N.*, having no interest in the bills, and having acted merely as his friend and agent. The commission had not then issued. Neither *S.* nor the bank agent knew of the act of bankruptcy. The bills were sent to the Bank of *England* from the branch, uncancelled. The practice at the branch banks, when bills are changed there, is, to take an indorsement and send them up uncancelled: Held,

First, that the delivery of the 1000*l.* to *S.* for the bills was a transaction between the Bank of *England* and *N.* the bankrupt, by their respective agents.

Secondly, that the changing of the bills, whether considered as a purchase of them, or as a payment in discharge of the liability of the Bank, was not a valid transaction, unless protected by sect. 82. of the Bankrupt Act, as a payment made without notice of an act of bankruptcy.

N. absconded (as above stated) *March* 12th. Application was made by solicitors on the 16th to the Bank of *England*, to stop the bills, describing them, and stating that *N.* had absconded with them. On the 8th of *April* the same solicitors again applied at the Bank to the same effect, and it was then stated that a fiat of bankruptcy against *N.* was expected by every post. The bills were changed at *Gloucester*, *April* 12th:

Held, that there was sufficient notice to the Bank to take away the protection of 6 *G.* 4. *c.* 16. *s.* 82.; and that such notice to the Bank operated as notice to the branch bank, a reasonable time having elapsed for transmitting it before the bills were received there from *S.*

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Norcliffe or his order, at seven days' sight, and accepted by the Bank at the time they were issued (*a*).

On the same day, the bills were remitted by *Blackstock* and *Bunce* to Mr. *Grace* at *Liverpool*, then the attorney of *Norcliffe*, who on the 4th March paid them over to *Norcliffe*. On the 12th *March* 1833, *Norcliffe* absconded from *Liverpool*, and committed an act of bankruptcy on that day. On the 16th, Messrs. *Blackstock* and *Bunce*, in consequence of instructions from *Liverpool*, applied to the Bank of *England* in *London* to stop the payment of the bank post bills, and informed the Bank that *Norcliffe* had absconded from his creditors with the bank post bills in question; whereupon an entry of such application was made by the defendants in their books in the following terms, which entry was seen at the time by the clerk of Messrs. *Blackstock* and *Bunce* who made the application: —

"Messrs. *Blackstock* and *Bunce*, 18 *Serjeants' Inn*, *Fleet Street*, solicitors, on behalf of *Robert Grace* of *Liverpool*, apply to stop payment of the four following bank post bills with which *Charles Norcliffe* of *Liverpool* has absconded, viz.

"No. M. 7040 to *Charles Norcliffe* 500*l*."

(Similar descriptions were given of the other three bills.)

(*a*) The bills were in the following form: —

Bank Post Bill.

No. M. 7042. *London*, 2d *March* 1833.

At seven days' sight, I promise to pay this my sola bill of exchange to *Charles Norcliffe*, Esquire, or order, five hundred pounds sterling, value received of Messrs. *Blackstock* and Co.

Accepted, 2d *March* 1833.

H. Brent.

For the Governor and Company of the Bank of *England*.

T. Needham.

£500. *T. S.*

Entd. *E. R.*

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On the 8th of *April* the bill for 100*l.* was presented at the Bank by a Mr. *Graves*; but payment was withheld, in consequence of the stop, on the indemnity of Messrs. *B.* and *B.*, and the holder was referred to them; but they ultimately paid Mr. *Graves* the amount of his claim upon the 100*l.* bill, and the Bank, with *Graves*'s consent, paid the amount of the bill to Messrs. *B.* and *B.* as agents of *Norcliffe*'s assignees. On the same 8th of *April*, the defendants were again informed by Messrs. *B.* and *B.* that *Norcliffe* had absconded with the bills, and were also told by them that the necessary documents for a fiat of bankruptcy against *Norcliffe* were then expected by every post, and they were again requested not to part with the 100*l.* bill; and accordingly the defendants withheld the payment on the said indemnity of Messrs. *B.* and *B.*

The said *Charles Norcliffe* was acquainted with a Mr. *Smallridge*, an attorney and proctor at *Gloucester*, who had transacted business for him as his attorney some time before, *Norcliffe* having formerly kept an inn at *Stroud* in *Gloucestershire*. *Norcliffe*, on the 12th of *April* 1833, applied to *Smallridge*, and explained to him that he wanted 1000*l.* in gold, to pay off a mortgage, in exchange for two of the bank post bills he then produced, which were two of the bills the subject of the present action.

Mr. *Smallridge*, on the same 12th of *April*, applied to the agent for the Bank of *England* branch at *Gloucester* for 1000*l.* in gold, in exchange for the said two bank post bills. *Smallridge* was known to the agent, who gave him 1000*l.* in gold in exchange for the two bills. *Smallridge* immediately afterwards handed over the 1000*l.* in gold to *Norcliffe*. *Smallridge* was examined

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as a witness for the plaintiffs at the trial, and stated that he gave no value for the bills, and had no interest in them, but handed the whole amount of the proceeds over to the bankrupt without any deduction, and that he acted merely as the friend and agent of *Norcliffe* in the transaction. The two bills so changed at *Gloucester* were indorsed in blank by the bankrupt some time after the 12th of *March*, and before he delivered them to Mr. *Smallridge*, but at what precise period did not appear. On applying for change, *Smallridge* was required by the agent of the branch bank to indorse the bills, and he did so before receiving the cash, as follows: — "Pay the Governor and Company of the Bank of *England*. *C. Smallridge*." At the time of this transaction, *Smallridge* did not know that *Norcliffe* had absconded from his creditors or committed an act of bankruptcy.

The said two bank post bills were, in the usual course of business, remitted by the said agent of the governor and company of the Bank of *England* at *Gloucester*, to the Bank of *England*, on the 16th of *April* 1833, and the governor and company gave notice thereof to Messrs. *B.* and *B.* by the following letter: —

"Secretary's office, Bank of *England*.

"Gentlemen, 17th *April* 1833.

"The bank post bills for 500*l.* each" (mentioning the numbers and dates), "stated by you to have been embezzled, were this day presented at the Bank for payment; and, upon application at this office, you will be furnished with the particulars of the information collected as to the holder of the bills. The governor and directors of the Bank of *England* cannot engage to withhold payment of the bills, unless they are furnished by you

you (and that immediately) with evidence to impeach the title of the holder. I am," &c.

"*M. B. Sampson.*"

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The bills when remitted to *London* were not cancelled. Bank post bills changed at the branches are required to be indorsed, and are not cancelled at the branches. Such bank post bills frequently circulate about the country as cash for a very considerable period, and they have a great circulation.

On the 11th of *April* 1833, the said *C. Norcliffe* applied to Messrs. *Tugwell* and *Co.*, bankers at *Bath*, to whom he was known, having some time before had an account with them as bankers, to change the third bank post bill for 500*l.* (No. 7041), also the subject of the present action. *Tugwell* and *Co.* gave him cash for the same; and *Norcliffe* thereupon indorsed the said bill in the banking-house of *Tugwell* and *Co.* and delivered it to them. *Tugwell* and *Co.* afterwards paid away the bill for value to Messrs. *Smith* and *Moger* of *Bath*, and they afterwards paid the same for value to one *Lathbury*. The case then stated various transfers of this bill for value, in the course of which (*April* 22d) it came a second time to the hands of *Tugwell* and *Co.* for value; was again paid away for value by them; and, ultimately, was paid (*May* 29th), by one *W. Templeton*, to a clerk of the *Bristol* Bank of *England* branch, as cash to be remitted to His Majesty's Exchequer, on account of the collection of the taxes; and the Bank of *England* gave the Exchequer credit for the amount. The last-mentioned bill was remitted in the usual course of business, on the 31st of *May* 1833, by the branch bank at *Bristol* to the said governor and company, who thereupon

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thereupon gave notice thereof to Messrs. *Blackstock* and *Bunce* by a letter to the same effect as that already set forth.

On the 18th of *April* 1833, a fiat in bankruptcy was issued against *Norcliffe*, under which he was duly found and declared a bankrupt, and the plaintiffs were duly appointed his assignees. And the case stated a demand and refusal of the three bills before action brought.

The question for the opinion of the Court was, whether the Plaintiffs were entitled to recover the three bank post bills for 500*l.* each, or any of them, from the defendants. The case was argued in last *Trinity* term (*a*).

Wightman for the plaintiffs. First, as to the bills changed at *Gloucester*. If they had been presented and changed at the Bank in *London*, the assignees might have recovered them. It was long since held, that indorsement by or on behalf of a bankrupt, after the act of bankruptcy, passed no property, *Thomason* v. *Frere* (*b*), *Pinkerton* v. *Adams* (*c*); and the law, since stat. 6 *G.* 4. *c.* 16. *s.* 82., is still the same, as against those who know, or have reason to know, that an act of bankruptcy has been committed. Here the Bank in *London* had such notice and accepted it, as appears by the transaction with *Graves*. It makes no difference that the bills were presented to the branch bank at *Gloucester*. Notice to the Bank in *London* was notice with relation to all the places where they carry on their business. Before stat. 7 *G.* 4. *c.* 46., it was doubted

(*a*) *June* 5th. Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Williams* Js.

(*b*) 10 *East*, 418.

(*c*) 2 *Esp.* 611.

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whether the Bank of *England* could, lawfully, carry on the business of banking otherwise than under the immediate direction of the governor and company; and therefore by that act, sect. 15, the governor and company were empowered to authorise agents to carry on such business for them at any place in *England*, and to invest such agents with the requisite powers of superintendence (*a*). Then, if they think proper to establish branches in several places, notice given at the Bank, the head office, is notice to the agents of the Bank at the branches, whether notice to the agents would be notice to the Bank or not. It may be said that there would

(*a*) Stat. 7 *G.* 4. *c.* 46. *s.* 15. "And to prevent any doubts that might arise whether the said Governor and Company, under and by virtue of their charter, and the several acts of parliament which have been made and passed in relation to the affairs of the said Governor and Company, can lawfully carry on the trade or business of banking, otherwise than under the immediate order, management and direction of the Court of Directors of the said Governor and Company; be it therefore enacted, that it shall and may be lawful for the said Governor and Company to authorize and empower any committee or committees, agent or agents, to carry on the trade and business of banking, for and on behalf of the said Governor and Company, at any place or places in that part of the United Kingdom called *England*, and for that purpose to invest such committee," &c. "with such powers of management and superintendence, and such authority to appoint cashiers and other officers and servants as may be necessary or convenient for carrying on such trade and business as aforesaid; and for the same purpose to issue to such committee," &c. "cashier or cashiers, or other officer or officers, servant or servants, cash, bills of exchange, bank post bills, bank notes, promissory notes and other securities for payment of money: provided always, that all such acts of the said Governor and Company shall be done and exercised in such manner as may be appointed by any bye-laws," &c. to be made by the General Court of the Governor and Company, or, in the absence of such bye-laws, by direction to be given as in that section is pointed out. "Provided always, that in any place where the trade and business of banking shall be carried on for and on behalf of the said Governor and Company of the Bank of *England*, any promissory note issued on their account in such place shall be made payable in coin in such place as well as in *London*."

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be an inconvenience to the Bank in obliging them to send a notice to all their branches, corresponding with the notice received at the establishment in *London*: but, if they have the benefit of carrying on business at several places, they must take it subject to that charge; and, on the other hand, it would impose an almost insurmountable difficulty on private persons to require that they should give such notice to the branches. They may not even know where such branches exist. In the case of a notice by carriers, notice to the principal has been held notice to the agent immediately employing the carrier; *Mayhew* v. *Eames* (*a*). In *Porthouse* v. *Parker* (*b*), where a bill was drawn upon *John Parker* by *Wood*, as agent of the defendants *George*, *James*, and *John Parker*, and there was no proof of *Wood*'s authority to draw, but the bill was accepted by an agent of *John*, on his account, Lord *Ellenborough* held that no proof of express notice of dishonour was necessary, as one of the defendants was an acceptor, and his knowledge was the knowledge of all. So here, in law, knowledge at the Bank was knowledge at the branches; if, in fact, notice was not sent to them from the Bank, it was negligence in the governor and company; and, if a loss is to be sustained by one of two innocent parties, he who has been negligent must suffer. The practice of the Bank, as stated in the case, cannot assist the defence, as the plaintiffs were not cognizant of it.

As to the third bill, it would be difficult to support the plaintiffs' claim, the bill having been presented by a person who had no notice of the act of bankruptcy, and who, therefore, would have been protected by sect. 82.

(*a*) 3 *B.* & *C.* 601. (*b*) 1 *Camp.* 82.

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of the bankrupt act, and might have maintained an action against the Bank if payment had been refused. As to that bill, therefore, the case is not pressed.

Maule, contrà. Unless the communications of Messrs. *Blackstock* and *Bunce* to the Bank can be considered a notice to the branch bank at *Gloucester*, the payment of the 1000*l.* to *Smallridge* on *Norcliffe*'s account, by that branch, was protected by stat. 6 *G.* 4. *c.* 16. *s.* 82., as a payment bonâ fide made to the bankrupt, before the commission, by persons who had not, at the time of such payment, notice of the act of bankruptcy. The eighty-second section was introduced to mitigate the hardship of the former bankrupt law on the subject of payments to the bankrupt, and was an extension of former enactments for the same purpose. One of these was stat. 1 *J.* 1. *c.* 15. *s.* 14., upon which it was held, in *Wilkins* v. *Casey* (*a*), that a liberal construction ought to be put, Lord *Kenyon* observing, that "the object of it was to protect certain payments made to a bankrupt, that common sense and justice required should be deemed valid payments, and in this instance to correct the rigour of the bankrupt laws." The giving of an acceptance, afterwards paid, was there held to be protected by the word "payment" in the statute. In *Hill* v. *Farnell* (*b*), where a party had bought books of the bankrupt, a hop merchant, and paid for them after acts of bankruptcy, which, however, were unknown to the buyer, it was held that such payment was protected by sect. 82. of 6 *G.* 4. *c.* 16., although

(*a*) 7 *T. R.* 711.

(*b*) 9 *B.* & *C.* 45. See *Baxter* v. *Pritchard*, 1 *A.* & *E.* 456.

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the circumstances in that case were stronger in favour of the assignees, than in *Cash* v. *Young* (*a*), which was relied upon for the defendant. Suppose, in the present case, the bankrupt himself had been known to the agent at the branch bank, and had got the bills exchanged by him, *Hill* v. *Farnell* (*b*) would have been applicable. Whether the bankrupt had title to the notes or not, the payment of 1000*l.* for them by the agent was made bonâ fide, and in ignorance of the act of bankruptcy, and was therefore within sect. 82. The Bank, then, is not affected by the bankrupt's want of title to transfer the bills, but has a right to hold them, at least till the money given for them be repaid.

But further, this was not a transaction immediately between *Norcliffe* and the branch bank agent. *Smallridge* had no notice of the act of bankruptcy; he took upon himself to pay *Norcliffe* for the bills; that payment, when made, would be protected by sect. 82. of the Bankrupt Act; and if *Smallridge*, in consequence, had a good title to the bills, so had the branch bank, to which he transferred his right. [*Patteson* J. *Smallridge* did not give a farthing for the bills. You assume that the plaintiffs could not have recovered them back if they had continued in his hands; but it is clear they could.] If he paid for the bills it is immaterial, as to the operation of the statute, how he was enabled to do so, or whether he handed them over or kept them. The agent at the branch bank gave the 1000*l.* as a payment to him, he professing to give title to the bills; and if he could not give title, he is liable to the Bank of *England*. The delivery of the bills by *Smallridge* was not a presenting for payment: the transaction

(*a*) 2 *B.* & *C.* 413. (*b*) 9 *B.* & *C.* 45.

was,

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was, that a party, happening to be known at the branch bank, obtained the accommodation of sovereigns for paper. Bank post bills, drawn in *London*, it is well known, are payable there only. In general, bills or notes, made payable by a corporation simply, are not payable wherever that corporation has an agent: the bill, even of an individual, is not payable in any place where his agent happens to be, unless the agent be there for the purpose of making payments. And, as to the Bank, the act 7 *G.* 4. *c.* 46. *s.* 15. directs that promissory notes issued at any branch shall be made payable in coin there, but makes no provision for the payment in coin of *London* bank post bills at the branches: it may, therefore, be concluded that the bank need not pay gold at the branches for such bills. If payment could have been demanded at *Gloucester*, *Norcliffe*, though unknown, might have applied for it himself. The bills were not cancelled as paid bills. There is nothing in the case to shew that this branch had authority to pay them. [*Patteson* J. *Smallridge*, in his evidence, declared that he had no interest in the bills, but acted merely as the friend and agent of *Norcliffe*.] That was but his own opinion as to the legal effect of the situation in which he was placed. In one sense he had no interest; but he had an interest at least as the holder of a negotiable security.

The case may also be put on a ground independent of stat. 6 *G.* 4. *c.* 16. *s.* 82. These bills have been considered, on the part of the plaintiffs, as if they were an ordinary chattel, over which the holder can only give such right as he himself has, unless there has been a sale in market overt. But in the case of negotiable instruments, especially these, which pass like the currency

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rency of the country, the party taking has a good title, independent of the right of the party transferring. A doctrine has indeed prevailed, that the person taking a negotiable instrument must shew that he used such caution as a prudent man acquainted with business would exert; but this gave rise to many complicated questions, and the law has now nearly reverted to the old rule, which was that of certainty and convenience, that the bonâ fide holder of a negotiable instrument for value is entitled as against every one. It would probably be considered now, if the precise point arose, that the real question was bona fides: this may be inferred from the language of the Court of Exchequer in *Foster* v. *Pearson* (*a*), and from late dicta of learned Judges at Nisi Prius. It was held, in *Crook* v. *Jadis* (*b*), that, to impeach the holder's title, gross negligence must be shewn; but the question of gross negligence would probably be considered as part of the question of bona fides. [Lord *Denman* C. J. It would, perhaps, be more correct to say that the same facts might raise the presumption of gross negligence or that of fraud. The facts might shew a determination to wink at any thing.] In the present case, the instruments being negotiable, a good title might be taken, though from a party having a bad one.

Then as to the notice. The stopping of payment at the bank is not a duty, but an accommodation rendered to the public. Here the first transaction relied upon as a notice (*March* 16th) had reference merely to the stopping of payment. It was, at all events, not a

(*a*) 1 *Cro. M. & R.* 855. *S. C.* 5 *Tyr.* 262.

(*b*) 5 *B. & Ad.* 909. And see *Backhouse* v. *Harrison*, 5 *B. & Ad.* 1098.

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notice of an act of bankruptcy. [*Littledale* J. The notice stated that *Norcliffe* had absconded from his creditors, and with bills payable to himself.] The application was made by *Blackstock* and *Bunce* on behalf of *Grace*, but without shewing who were the parties claiming, or by what title. Neither was the communication of *April* 8th a notice, specifically, of an act of bankruptcy. To bind the rights of parties who might be interested, it should have been precise, and have pointed to some act of bankruptcy committed at some particular time. But, supposing that this was a good notice, it was not a notice throughout *England*. "Notice" in sect. 82. of the bankrupt act means knowledge. A party is not bound to use diligence to obtain it; nor is the Bank obliged to give it at all the branches. If notice is given to a wholesale house by assignees, or a party robbed, not to take particular bills, the house will take such bills at their peril: but are they bound to write by the next, or by what post, to all their agents? The party robbed, or the assignee, must look after his own interests, and give the proper notices himself. [*Patteson* J. The case here is rather more favourable to you than that of a private house or an individual, because there the party wishing to stop the bill could not so well be expected to know who were the agents.] Here it is true that the Bank is the party liable to pay, but the agents are not agents ad hoc; and an individual, in such a case as this, would not be bound to give notice to an agent who was not employed as such for the purpose of making payments. [*Patteson* J. The agent at *Gloucester* paid the amount of the bills and took a special indorsement. He might not be bound to do this, but the case does not state that he exceeded his authority.] The whole trans-

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action shows that this was not a payment of the bills by the Bank. They took them as part of the ordinary currency of the country. The bills were handed over to the branch bank, and money given in exchange, on the credit of *Smallridge* who indorsed them. [*Patteson* J. Did you ever hear of the acceptor of a bill taking it from the holder, otherwise than as paying it?] This was as if the agent of a banker, in collecting debts, took one of his employer's notes among other money. The cases of notice to one of several partners do not apply, because each partner authorizes every other to act for him in the business to which the notice relates. The practice of giving such notices to the branch banks as are here insisted upon would be of little use, because the bills circulate as currency without being carried to the banks; and it would be very inconvenient if the branch banks had to run the risk of stopping every bill of which notice had been given at the Bank in *London*, till a letter could be written to *London* and the answer received. The desire of a party, that payment should be stopped, does not give an authority to stop, as against a *bonâ fide* holder.

Wightman in reply. Stat. 6 *G.* 4. *c.* 16. *s.* 82., and the case of *Hill* v. *Farnell* (*a*), may apply to the third bill; though before the last bankrupt act it might have been contended, on the authority of *Bishop* v. *Crawshay* (*b*), that the assignees were entitled to recover, even for this. As to the other two. It is said that the transaction at *Gloucester* was merely a giving of money in exchange for bills, on *Smallridge's* credit. But the bills were pre-

(*a*) 9 *B.* & *C.* 45. (*b*) 3 *B.* & *C.* 415.

sented

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sented to and paid by an agent of the Bank. He claimed nothing for commission. If it had been a purchase, he would not have given the full value in gold. The indorsement was as a receipt; and it was made to the Governor and Company of the Bank of *England*, not to any intermediate party. [*Patteson* J. If the agent had wished to circulate it again, he must have indorsed in the name of the Bank, which was the acceptor.] *Smallridge* here was a mere messenger, like the defendant in *Coles* v. *Wright* (*a*). It is said that the Bank was not liable to pay these bills at the branches; but these are instruments which may be presented for payment anywhere; and, if payment is in fact made at one of the branches, though unnecessarily, it makes no difference where the bill is cancelled. Supposing the case to be within sect. 82 of the bankrupt act, there was here sufficient notice of an act of bankruptcy. No formal notice is necessary: it is sufficient if the facts are made known; and they were so here by the two communications of Messrs. *Blackstock* and *Bunce*, the last referring to the first. The trouble which the defendants would have in giving notice to the branches cannot alter the legal duty. If they are not bound to do so, they need not, if they had only one branch establishment. [*Littledale* J. If it would be inconvenient to an individual to send notices to the branch banks, it would also be a great inconvenience to the Bank to send such notices with all the requisite particulars.] The bank post bills drawn in *London* need not be paid at the branches at all. But the Bank in this case might easily have sent word to the branches, if any bills came indorsed by *Norcliffe*, not to pay them; or at least not to

(*a*) 4 *Taunt.* 198. See *Shaw* v. *Batley*, 4 *B.* & *Ad.* 801.

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go out of the ordinary course in paying them. [Lord *Denman* C.J. The Bank are strangers to the party giving the notice to stop. What duty do you say that notice imposes on them?] It is a warning both to them, and to their branches, that if they pay such a bill they do so at their peril. It is asked by what post the notice ought to be forwarded to the branch banks? In this case, it is sufficient to say that at any rate a reasonable time for sending the notices had elapsed.

Cur. adv. vult.

Lord DENMAN C. J. in this term (*Nov.* 23d.) delivered the judgment of the Court.

This was an action of trover to recover three bank post bills for 500*l.* each, all of which were in the possession of *Norcliffe*, the bankrupt, at the time when he committed an act of bankruptcy by absconding on the 12th of *March* 1833, and all of which he disposed of after the act of bankruptcy, and before the issuing of the fiat for the commission, which took place within two months from the act of bankruptcy, viz. on the 18th of *April*.

On the 16th of *March* notice was given to the Bank of *England*, in *London*, that the bankrupt had absconded from his creditors with the bills. And on the 8th of *April* further notice was given to the Bank of *England*, in *London*, that the necessary documents for a fiat in bankruptcy against *Norcliffe* were expected by every post.

One bill was passed by the bankrupt on the 11th of *April* to Messrs. *Tugwell* and *Co.*, bankers at *Bath*, who gave cash for it, and from them it passed through several other hands, and, ultimately, came to the Bank of

England

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England branch bank at *Bristol*, on the 29th of *May* 1833.

Messrs. *Tugwell* and *Co.* had no notice of any act of bankruptcy committed by *Norcliffe*, and, with respect to the bill passed to them, the only question is, whether the case comes within the 82d section of 6 *Geo.* 4. *c.* 16., as a payment bonâ fide made to the bankrupt, and, therefore, valid. Now, the cases of *Cash* v. *Young* (*a*) and *Hill* v. *Farnell* (*b*) have established the position, that a purchase of goods for ready money paid at the time comes within that section; and we see no reason why the taking a bank post bill for which cash is given at the time should not be equally within the same section. Messrs. *Tugwell* and *Co.*, therefore, acquired a property in the bill, and could pass the same to others: it follows, that the plaintiffs cannot maintain this action as to that bill: and, indeed, that point seems to have been conceded in the course of the argument.

The other two bills were delivered by *Norcliffe* indorsed in blank to Mr. *Smallridge* at *Gloucester*, on the 12th of *April*, in order that he might obtain cash for them from the Bank of *England* branch bank at *Gloucester*, Mr. *Smallridge* being acquainted with the agent of the Bank of *England* there. *Smallridge* obtained cash for the bills from the branch bank, and, by direction of the agent there, indorsed the bills, "Pay the Governor and Company of the Bank of *England*. *J. Smallridge*." *Smallridge*, however, was merely agent for *Norcliffe*, to whom he immediately handed over the cash, and had no interest of any kind in the bills: he had no notice of any act of bankruptcy committed by *Norcliffe*, nor had the agent at *Gloucester*.

(*a*) 2 *B.* & *C.* 413. (*b*) 9 *B.* & *C.* 45.

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It is contended, and we think rightly, that these bills were not presented for *payment* to the branch bank; for, though the 7 *G.* 4. *c.* 46. *s.* 15. requires that bank post bills issued by the branch banks shall be payable *there*, as well as in *London*, yet the converse is not enacted, and bank post bills issued in *London* are not payable at the branch banks. They were presented, as they might have been to any other bankers, asking for change. Still the question is, to *whom* were they presented and delivered at *Gloucester?* and the answer is undeniable, that they were presented and delivered to the Bank of *England* (the defendants) at *Gloucester*, not to the individual who was their agent there, as an individual. The Bank of *England* carry on the business at *Gloucester* by the agent, who, in the terms of 7 *G.* 4. *c.* 46. *s.* 15., was carrying on the banking business there "for and on behalf of the said governor and company:" the money paid for the bills was the money of the Bank of *England*, and the bills were indorsed to the Bank of *England*. The transaction at *Gloucester* took place therefore between the defendants by their agent on the one hand, and *Norcliffe* by his agent (*Smallridge*) on the other. Independently of the eighty-second section of 6 *G.* 4. *c.* 16., no property in the bills would pass to the defendants from *Norcliffe*, on account of the previous act of bankruptcy. And the payment by the defendants to him, whether made by way of purchase of the bills, or by way of discharging their liability as acceptors, can only be protected under the eighty-second section, provided they had no notice of any act of bankruptcy committed by him.

This reduces the case to the question, what was the effect of the notices given to the Bank of *England* in

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in *London?* We are clearly of opinion that those notices, taken together, even if any doubt could be raised as to the first, amount to notice of an act of bankruptcy committed by *Norcliffe*. The general rule of law is, that notice to the principal is notice to all his agents, *Mayhew* v. *Eames* (*a*); at any rate, if there be reasonable time, as there was here, for the principal to communicate that notice to his agents, before the event which raises the question happens.

Considering that direct notice was in this case given to the defendants themselves of the bankruptcy of the holder of the bills, we steer clear of the doctrine (lately much disputed) of negligence or imprudence in the party receiving negotiable instruments for consideration, and without fraud.

We have been pressed with the inconvenience of requiring every trading company to communicate to their agents every where whatever notices they may receive; but the argument ab inconvenienti is seldom entitled to much weight in deciding legal questions; and, if it were, other inconveniences of a more serious nature would obviously grow out of a different decision.

For these reasons we are of opinion that the plaintiffs are entitled to recover the value of two of the bills in question, but not of the third; and the verdict must be reduced to 1000*l.*

Verdict to stand for 1000*l.*

(*a*) 3 *B.* & *C.* 601.

1825.

The KING *against* The Inhabitants of WOKING (*a*).

By a local act, the soil of a river was vested in trustees of a navigation, who were to receive the profits of such navigation, and apply them in the first instance in repairs and amendments, and in keeping the river navigable, &c. By the same act, confirming certain articles of agreement, it was provided that *M.* should receive, out of the profits of the said navigation, so much for every ton, &c. navigated on the river, and that *D.* should receive so much for every ton navigated on the said river within his own land situate in the parish of *S.* And that the trustees should pay to the persons to whom any shares of the profits should be allotted, in the manner provided by the act, such respective shares yearly, after deducting the costs of repairing and amending the premises, and executing the trusts. Satisfaction for damage to lands, &c. by cutting passages or heightening the waters, was to be paid by the trustees out of the profits of the navigation, before the persons entitled to shares of the profits should receive such shares.

Tolls were taken as follows: — On vessels using the whole line of the navigation, 4*s.* Between a certain point above the parish of *W.*, and the beginning of *W.*, 3*s.* From the beginning to the end of *W.* (and to a point below), 2*s.* 6*d.* From thence to the lower end of the navigation, 2*s.*: Held,

1. That the poor-rate payable by the trustees for the part of the navigation in *W.* was to be estimated, not by the increase of toll taken within *W.*, but by a mileage calculation, the gross amount of toll upon any voyage including *W.* being distributed evenly over the line travelled, and the amount payable by *W.* being calculated by the proportion which the length of navigation in *W.* bore to the whole of the line travelled, whether the voyage extended over the whole length of navigation, or a part of it, including *W.*

2. The expense of repairs being equal through the whole line, that the amount of such repairs was to be deducted on a like mileage calculation.

3. That, in estimating the rateable profits, the compensations to *M.* and others were not to be deducted. And this, even in the instance of compensation for injury to a mill situate within the parish of *W.*

4. Also (on the assumption that lands in *W.* were rated at rack-rent and no more), that ten per cent. was to be deducted from the rateable amount, for the tenant's profit.

BY a rate for the relief of the poor of the parish of *Woking* in *Surrey*, the Earl of *Portmore* and *John Stephen Langton* Esquire were rated, as proprietors of the river *Wey* navigation, on 325*l.*, at the sum of 16*l.* 5*s.* They appealed to the sessions on the grounds, that they were not liable to be rated, and that they were over-rated, and the sessions allowed the appeal, subject to the following case.

By stat. 22 & 23 *Car.* 2. *c.* 26., private, "for settling and preserving the navigation of the river *Wey*," the river was declared navigable, and the soil of the

(*a*) See *Rex* v. *The Earl of Portmore*, 1 *B.* & *C.* 651.

river,

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river, and so much of the banks as extended on any side of any cut made since 1650, and the locks, sluices, towing-paths, wharfs, &c., were vested in trustees, who were "to receive the profits of the said navigation, and apply them in the first place in and towards the reparation and amendments of the said river, banks, sluices, dams, tumbling bays, and premises, used for and in order to the navigation of the said river, and for making and continuing the same navigable, and for servants' wages to be by them employed in and about the premises, and for the management thereof," and to dispose of the residue as was after directed; and they were authorised (under certain restrictions) to remove, alter, and amend all impediments, &c. to the navigation.

By the same act, confirming certain articles of agreement, it was provided that Lord *Montagu*, his heirs, executors, &c. "should receive out of the profits of the said navigation 2½*d.* for every ton, chaldron, or load navigated on the said river;" that *Thomas Dalmahoy*, his heirs, executors, &c. should receive 4*d.* for every ton, chaldron, or load navigated on the said river within his own land, situate at *Depdeene*, in the parish of *Stoke*, next *Guildford*, besides 20*l.* per annum for a wharf, situate in the same parish; and that the corporation of *Guildford* should receive 1*d.* for every ton, &c., navigated on the said river or any part thereof. And that the trustees "should pay to the person or persons to whom any share or shares of the profits of the said navigation should be allotted respectively, in the manner provided by the said act, and his or their heirs and assigns, such respective parts and shares of the clear and neat profits of the said navigation yearly and every year for

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for ever, after deducting of the costs, charges, and expenses of the repairing and amending of the said premises, and executing the trusts in the said trustees reposed." And further that certain recompense and satisfaction should be appointed, to be paid out of the profits of the navigation to any person who had received damage in his lands or tenements by the cutting of passages or heightening of waters in order to the navigation of the river; and that the satisfaction so allotted should be paid out of the profits of the navigation, before the respective persons to whom such shares of the profits of the said navigation should be allotted should be admitted to receive their respective shares of the said profits.

The act provided that the river should not be navigated without the leave of the trustees, and empowered them to take from the owners of vessels "passing upon the river or any part thereof, the sum of 4*s.* for every chaldron of coals, and 4*s.* for every load or ton of corn," &c., and so after that rate for a greater or less quantity. The following tolls have been fixed by the present trustees: —

	s.	*d.*
"Between *Guildford* Wharf and the river *Thames*	4	0
Between *Depdeene* Wharf and the river *Thames*	4	0
Between *Stoke* and the river *Thames* - -	3	6
Between *Bowers* and the river *Thames* - -	3	0
Between *Triggs*, or *Send Heath*, and the river *Thames* - - - -	2	6
Between *Newark* and the river *Thames* -	2	0

And so on according to the distances, with similar rates, decreasing in the same proportion, from the *Thames* to *Guildford*.

Triggs

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Triggs is in the parish of *Woking*, and *Send Heath* is in the parish of *Ripley* (*a*); and that part of the navigation which is in the parish of *Woking* extends from a spot between *Bowers* and *Triggs* to a spot between *Triggs* and *Newark*. If the increased toll is considered to be earned for the use of the navigation between the points above named, then the sum of *3d.* per ton is payable in respect of that part of the navigation situate in the parish of *Woking*.

There are no toll-houses or paying-places on the river, but the entire tolls for the whole navigation performed are paid at once.

The whole length of the navigation is 27,060 yards: the length in *Woking* parish 4049 yards.

Upon an average of the last three years,			
The gross receipts for the tonnage upon the navigation are -	£5923	16	10
Gross receipts, deducting for tonnage not passing through *Woking* - - -	4705	12	6
The latter sum is made up of			
Receipts of the *thorough trade* (going the whole line of the navigation) - - -	4311	13	1
The *short trade* passing through *Woking* - - -	393	19	5
	£4705	12	6

The share of *Woking* in the gross receipts for the whole tonnage of the navigation,

(*a*) On the side of the river *Wey* opposite to *Woking*.

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navigation, upon a mileage calculation, is - - - £886 9 11

Share in such gross receipts, deducting for tonnage not passing through *Woking*, upon a mileage calculation 688 14 2¼

That is,

Woking's share of the thorough trade £630 5 4½

——— of the short trade - - 58 8 9¾

The share of *Woking* in the tolls upon a calculation of 3*d.* per ton, being half the 6*d.* rise for *Triggs* and *Send Heath*, according to the scale set forth in the case, for every ton passing *Woking*, is - - - £309 0 0

Then followed an estimate (on the same average of three years) of

The general expense of the navigation, exclusive of compensations £2566 19 4

The compensations, viz. to Mr. *Dalmahoy*, to the *Corporation*, to Lord *Montagu*; and for mills (one only in the parish of *Woking*); amounting in the whole to - - - 1226 3 0

The expenses of the navigation in *Woking* were stated to equal the expenses in the other parts of the navigation, regard being had to comparative length.

The share of *Woking* in the whole expenses, exclusive of compensations, on a mileage calculation, was stated at - - - - - - £384 2 10

Share

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Share in the compensations, on the like calculation - - -	183	9	10
The net income of the navigation, on an average of three years, is -	2230	14	6
The share of *Woking* in the net profits, upon a mileage calculation, without deduction - - -	333	16	10
Ten per cent would be a reasonable deduction from the net income for tenants' profit, leaving - -	2007	13	1
Share of *Woking* after such deduction	£300	8	10

The questions for the opinion of this Court were — First, whether the sum in which the appellants are liable to be rated by *Woking* is to be ascertained by the proportion which the length of the navigation in *Woking* bears to the whole length thereof; and, if so, what deductions are to be made from that sum.

Secondly, whether the sum in which the appellants are to be rated, is to be ascertained by the amount of tonnage on all goods carried through *Woking*, at the rate of 3*d.* per ton; and, if so, what deductions are to be made from that sum.

If the Court should adopt the first mode of ascertaining the amount of rate, the appellants claimed to make the following deductions from the amount (886*l.* 9*s.* 11*d.*) stated as the share of *Woking* in the gross receipts for the whole tonnage upon a mileage calculation.

1. Tonnage not passing through *Woking* (thereby reducing the share, as before stated, to 688*l.* 14*s.* 2$d\frac{1}{4}$)	£197	15	8$\frac{3}{4}$

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2. Share in the general expenses on a mileage calculation, excluding compensations - - 384 2 10

3. Share in compensations, on the same calculation - - 183 9 10

The last two sums were to be deducted from 688*l.* 14*s.* 2¼*d.* And from the residue, after such deduction (121*l.* 1*s.* 6¼*d.*), the appellants claimed further to deduct,

4. Tenant's profit, 10 per cent. - 12 2 0

Leaving, as the sum on which the appellants were to be rated - - 108 19 6¼

If the Court should adopt the second mode of ascertaining the amount of rate, and should hold that the gross receipts applicable to *Woking* were to be calculated at 3*d.* per ton on all goods carried through *Woking*, the appellants claimed to make from the sum produced by such calculation the second, third, and fourth of the above deductions: in which case the deductions would exceed the receipts. The respondents denied that any of the above deductions could be made.

This case was argued in *Hilary* and *Easter* terms, 1835 (*a*).

Thesiger, *Clarke*, and *M. Chambers*, in support of the order of sessions. First, the rate is to be ascertained by the amount of tonnage on all goods carried through *Woking*, at 3*d.* per ton. It was settled by *Rex* v. *Milton* (*b*), *Rex* v. *Palmer* (*c*), and *Rex* v. *The Earl of*

(*a*) *January* 24th, before Lord *Denman* C. J., *Littledale* and *Williams* Js.; and (the argument having been adjourned) *April* 25th, before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

(*b*) 3 *B.* & *Ald.* 112. (*c*) 1 *B.* & *C.* 546.

Portmore

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Portmore (*a*), that the proprietors of a navigation are rateable in every parish through which it passes, in respect of their land covered with water, there situate, and used for such navigation; and they are rateable in each parish in proportion to the profit which their land, within that parish, used in the navigation, produces: *Rex* v. *Kingswinford* (*b*), *Rex* v. *Lower Mitton* (*c*). Where the profits are equal throughout the line of navigation, the amount to be levied in any particular parish may be ascertained by the proportion which the length of navigation within the parish bears to the whole line; but, if they are unequal, the rate must be regulated by the amount of profit within the parish. This principle was recognised in *Rex* v. *Chaplin* (*d*). Here the rate of tonnage in *Woking* varies from that in other parts of the navigation; and therefore the assessment must be according to the amount of tonnage earned in that particular parish, which is 3*d.* per ton, if the 6*d.* paid on that part of the navigation which lies in *Woking*, and not paid below, be divided between *Woking* and *Ripley*. It is true that, according to this mode of assessment, the company will have no profits in *Woking* to be rated; but that cannot affect the principle of rating; and the parishes in which more is actually earned will gain the more.

Then as to the deductions. First, it is clear that the compensations to Lord *Montagu* and others must, by the local act, be made before the proprietors can receive any dividend. The compensations are the outgoings; they never come into the account of profits, but must be set-

(*a*) 1 *B.* & *C.* 551.
(*b*) 7 *B.* & *C.* 236.
(*c*) 9 *B.* & *C.* 810.
(*d*) 1 *B.* & *Ad.* 926.

tled

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tled before any rateable subject-matter accrues. If there were no profit more than sufficient to pay them, there would be no beneficial occupation: *Rex* v. *Liverpool* (*a*). And, if these compensations are to be regarded as outgoings which would cause the property to let at a lower rent, they must be excluded from consideration in calculating the rate: *Rex* v. *The Trustees of the Duke of Bridgewater* (*b*), *Rex* v. *Adames* (*c*). The compensations are at no time any part of profits arising within the parish; they accrue in respect of the whole navigation; they have no necessary connection with land any where, but are personal merely, and are like the tolls granted to the proprietors of *Hunslet Mills*, in *Rex* v. *The Aire and Calder Navigation Company* (*d*). The cost of repairs must also be excluded, upon the principles laid down in *Rex* v. *Kingswinford* (*e*), and according to the decision in *Rex* v. *The Oxford Canal Company* (*g*). The propriety of deducting 10 per cent. (which the case states to be a reasonable proportion) for tenant's profit, appears from the judgment of the Court upon the second objection in *Rex* v. *Joddrell* (*h*).

Sir *John Campbell*, Attorney-General, and *Gaselee*, contrà. The rate ought to be charged according to the proportion which the length of navigation in *Woking* bears to the length of the whole line. The principle of mileage is reasonable and convenient, and most conformable to the intention of the local act, upon which the decision of this case entirely depends. The act, in

(*a*) 7 *B.* & *C.* 61.
(*b*) 9 *B.* & *C.* 68.
(*c*) 4 *B.* & *Ad.* 61.
(*d*) 3 *B.* & *Ad.* 533.
(*e*) 7 *B.* & *C.* 236.
(*g*) 10 *B.* & *C.* 177.
(*h*) 1 *B.* & *Ad.* 408.

the

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the several clauses stated in the case, evidently treats the navigation as one entire concern. The payment of rates is one of the purposes to which, according to the evident intention of the act, "the profits of the said navigation" (generally) are, in the first instance, to be applied. The clause authorising the trustees to take toll evidently contemplates a general mileage toll. The payments to Lord *Montagu* are to be made "out of the profits of the said navigation" generally. The expense of repairs is in proportion to the length of the navigation in each parish; but, according to the appellants, the trustees may make an arbitrary apportionment of tolls, and thereby distribute the burden of rates as they think proper. This is a power which they ought not to exercise. The principles laid down in *Rex* v. *Kingswinford* (*a*) are not disputed; but this is not a case to which they apply. There may be a reason for rating canals differently according to the difference of profits in one parish and another, which does not apply to rivers, viz. that the land taken for a canal was yielding some profit in the parish before, and liable to be rated there in proportion to the profit so produced, in which case it may be said that the principle of rating the land ought not to be altered.

As to the deductions, it must be admitted that the expense of repairs ought to be allowed for. With respect to the compensations, which are an interest possessed by certain parties in the navigation, there is no reason that they should be paid and deducted before the rate can be assessed. The case does not shew the nature of the compensations to Lord *Montagu* and the

(*a*) 7 *B.* & *C.* 236.

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corporation of *Guildford*; but all these payments appear to be in the nature of a rent. The groats payable to Mr. *Dalmahoy* are a rent to him for his land in the parish of *Stoke*. One mill appears to be in the parish of *Woking*; but the payment is not made in respect of the building situate there: it is for the water withdrawn from the mill by the navigation generally. There is nothing to shew that *Woking* ought to suffer on account of any of these charges.

Cur. adv. vult.

Lord DENMAN C. J., in this term (*November* 25th), delivered the judgment of the Court.

The rule by which canal companies are to be rated is laid down in the case of *Rex* v. *Kingswinford* (*a*) in these words: "The true principle is this: a canal company is to contribute to the relief of the poor in each parish through which the canal passes in proportion to the profit which they derive from the use of their land in that parish." It is also truly observed, in the same judgment, that, if the traffic be the same through the whole line of the canal, every part of the canal will earn an equal proportion of the tolls. On the other hand, that, if the profit vary in different parishes, the rate also must vary.

Apply that principle to the present case. The thorough trade pays one gross sum for the whole line, and all parts of the line are equally profitable: the proportion of the parish of *Woking* must, therefore, be ascertained by a mileage calculation, with reference to the whole line. Again, the short trade, as it is called,

(*a*) 7 *B.* & *C.* 242.

pays

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pays one gross sum for the whole distance gone over, and all parts of that distance are equally profitable: the proportion of the parish of *Woking* must, therefore, be ascertained by a mileage calculation, with reference to the whole distance gone over. The tolls earned by passing over parts of the canal which do not include the parish of *Woking* will be wholly excluded.

By the facts found in the case, the true proportion of the parish of *Woking* in the gross receipts, according to this calculation, is 688*l.* 14*s.* 2¼*d.*

The next question is, what deductions, if any, ought to be made from this sum? The necessary repairs and expenses must, of course, be deducted, and, as they are found to be equal throughout the line, the proportion of the parish of *Woking* is to be ascertained by a mileage calculation, and is found by the case to be 384*l.* 2*s.* 10*d.*

Mr. *Dalmahoy*'s groats are payable in respect of the use of the canal within his land in the parish of *Stoke*; and therefore, if they could be deducted at all, they must be deducted from the profits in that parish, and not from the profits in the parish of *Woking*. But these groats, as well as the per centages to Lord *Montagu*, and to the corporation of *Guildford*, are payable out of the *profits* of the canal, and are in truth nothing more than rent charges: they do not affect the value of the occupation, or the rent which a tenant would give, but only shew amongst whom and in what proportion the rent, or profits, are to be divided. The poor rates must be paid on the whole of the profits by those who receive them, viz. the proprietors, and they must settle the matter as they can with those who are entitled to share the profits with them.

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The same reasoning applies to the compensations to the mills, for they also are payable out of the profits. One only of the mills is situate in the parish of *Woking*, the compensation paid to which is 65*l.* 6*s.*; but, for the reasons stated above, we think that not even this sum can be deducted.

Upon the whole, the gross receipts earned in the parish of *Woking* are found, according to the principles here laid down, to be 688*l.* 14*s.* 2¼*d.* From that sum must be deducted 384*l.* 2*s.* 10*d.* for repairs and expenses, leaving a balance of 304*l.* 11*s.* 4¼*d.*, from which 10 per cent. for tenants' profits, amounting to 30*l.* 9*s.* 1½*d.*, must be deducted, according to the rule laid down in *Rex* v. *The Trustees of the Duke of Bridgewater* (*a*). The case, indeed, does not state distinctly that lands are rated at rack-rent and no more, in the parish of *Woking;* but, as it finds that 10 per cent. is a reasonable deduction for tenants' profits, we presume that the fact is so; and this deduction must be made in order to equalize the rate; and the sum at which the proprietors of the navigation ought to be rated will then stand 274*l.* 2*s.* 2¾*d.*

Rate to be reduced accordingly.

(*a*) 9 *B.* & *C.* 68.

CHARLES FREDERICK, Baron de RUTZEN, and MARY DOROTHEA, his Wife, *against* FARR.

DEBT. The first count was for tolls and duties, due and payable to the Baron and Baroness *de Rutzen*, in respect of divers cattle, goods, and merchandizes brought for sale into a fair or market, belonging to the plaintiffs in right of the Baroness *de Rutzen*, holden at *Narberth* in *Pembrokeshire*. There was a second count for tolls and duties (not mentioning on what articles,) due and payable to the plaintiffs as owners of the fair and market, in the same right. Plea, Nil debet. On the trial before *Gurney* B. at the *Haverfordwest Spring* assizes, 1834, the plaintiffs claimed the fair and market under a grant from *James* 2. (dated *Nov.* 17th, 4 *Ja.* 2.) to Sir *John Barlow*, knight and baronet, from whom they claimed to deduce title to an estate, called the *Slebech* estate, including the fair and market, by different assignments. Among other proofs, a lease of the tolls of the market by *Ann Trevanion*, through whom title was made, to *John Bateman*, for lives, at a specified rent, was produced; and a rental of the *Slebech* estate was also put in, in the handwriting of *Gilbert James*, a deceased steward of *Ann Trevanion*, in which he debited himself with the receipt of different payments of the rents reserved on this lease; and there was also

Accounts of rent, signed by a person, styling himself clerk to a steward, but not shewn to have been employed by such steward, otherwise than by the accounts themselves, are not evidence, after the decease of both, to prove the receipt, either by the clerk or the steward, of sums of money therein mentioned (*a*).

Where improper evidence is received, and a verdict given for the party adducing it, the Court will grant a new trial, although there be other evidence to the same point in favour of the same party; unless they see clearly that the improper evidence could not have weighed with the jury, or that the verdict, if given the other way, would have been set aside as against evidence.

(*a*) The recital of facts in the judgment will be found to vary in some degree from the statement in the introductory part of the case. It has been thought advisable to frame the marginal abstract on the judgment, as representing the supposition upon which the learned Judges proceeded in deciding the case: but the principle of the decision is little, if at all, affected by the variance.

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put in a rental, in the hand-writing of *John Protheroe*, a deceased clerk of *Gilbert James*, in which also *Gilbert James* was debited with the receipt of certain payments of these rents. It was proved by a clerk, who was in *James's* service at the same time with *Protheroe*, that the latter had to make out *James*'s accounts for him. Both these pieces of evidence were objected to; but the objections were over-ruled. A considerable body of other evidence was put in, shewing the receipt of the tolls by the different parties through whom the plaintiffs claimed, or their lessees; and the plaintiffs had a verdict. In *Easter* term, 1834, Sir *James Scarlett* obtained a rule to shew cause why this verdict should not be set aside, and a new trial had, by reason of the reception of the account in *Protheroe's* hand-writing. The rule was obtained on other grounds also; but on these no decision took place. In *Easter* term last (*Tuesday*, *April* 28th),

Sir *John Campbell*, Attorney-General, *Cresswell*, and *John Evans* shewed cause (*a*). The account objected to is in the writing of an authorized agent of the party charged by the writing; and this agent was proved to have been employed by the party as clerk, and to have kept his accounts for him; so that he had authority to charge him as steward. If the entry does not bind the steward, it must have been meant to bind the writer himself, and then it is unquestionably admissible. It may be compared to a pass-book at a banker's. It is true that the agent does not sign; but that is immaterial. Supposing, however, that the evidence was inadmissible, it may be rejected; and there will still be more than sufficient to support the verdict. That being so, the

(*a*) Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

Court

Court will not send the case back to a new trial. This was decided by the Court of Common Pleas, in *Doe dem. Lord Teynham* v. *Tyler* (*a*). It is true that the decision of the Court of Exchequer in *Crease* v. *Barrett* (*b*) is not quite consistent with that case. [Lord *Denman* C. J. In *Rex* v. *Sutton* (*c*) *Le Blanc* J. says that, if some parts of the evidence received be inadmissible, and others admissible, the Court has not the means of referring the verdict to those parts only which were admissible; and that it is their habit in such a case to grant a new trial.] That was said of criminal cases expressly.

Sir *W. W. Follett* contrà. To make this account admissible, it must be such an account as shews a liability in the writer. The parol evidence was, that *Protheroe*, being *James*'s clerk, kept his accounts. How can such an account make *Protheroe* liable? Even admitting that it may make *James* liable, it is not written by *James*, and is not therefore an entry charging the writer. As to the argument that this evidence is merely superfluous, and that the case was proved without it, the Court will not take upon themselves to decide as to the degree of weight which the jury might have attached to it. Besides, it was clearly evidence likely to produce considerable effect on the point as to which it was adduced.

(*Chilton and E. V. Williams* on the same side were not heard, the Court intimating that they would consider whether any further argument were necessary.)

Cur. adv. vult.

(*a*) 6 *Bing.* 561.
(*b*) 1 *C. M. & R.* 919. *S. C.* 5 *Tyrwh.* 458.
(*c*) 4 *M. & S.* 544, 548.

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Lord DENMAN C. J., in this term (*November* 25th) delivered the judgment of the Court.

In order to prove the plaintiffs' title to a market, for disturbing which this action was brought, recourse was had to certain leases found among their muniments, and also to certain accounts of rent for the same market, found in the same place. Some of these were accounts signed by the person who was then steward to the plaintiffs' ancestor, wherein he charged himself with the amount of such rents. To these no objection was made. Other accounts, of the same nature, were produced, signed, not by such steward, but by a person styling himself clerk to such steward. There was no parol evidence to shew that this person was ever employed by the steward; but the papers were tendered as speaking for themselves. They were severally objected to when tendered, but the learned Judge admitted them in evidence. We are clearly of opinion that they were not admissible, because they do not purport to charge the person whose signature they bear.

We were, however, strongly urged to discharge this rule for a new trial, even though this evidence may have been improperly received, on account of the manifest preponderance of the proof arising from that which was unobjectionable. To induce us to adopt this course, *Doe dem. Lord Teynham* v. *Tyler* (*a*) was strongly pressed upon us, founded as it was upon some former precedents both in this Court and in the Common Pleas. The same argument was urged in the Court of Exchequer, where evidence had been improperly rejected, in *Crease* v. *Barrett* (*b*); but the answer was given: It

(*a*) 6 *Bing.* 561.

(*b*) 1 *Cr. M. & R.* 919. *S. C.* 3 *Tyrwh.* 458.

may

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may be that the evidence may be readily explained, and may not weigh in the least against the very strong evidence to which it was opposed; but we cannot, on that account, refuse to submit the question to the consideration of another jury. Mr. Baron *Parke*, who pronounced the judgment of that Court, discusses the point at large; and a new trial was granted, because the Court could not say that if the evidence had been received it would have had no effect with the jury; nor that it was clear, beyond all doubt, if the verdict had been the other way, that it would have been set aside as improper.

In like manner, we are not convinced that the documents improperly admitted did not weigh with the jury in forming their opinion, on that their verdict, if given for the defendant, must have been set aside as against evidence. On this point, therefore, the rule must be made absolute; and we need not refer to the numerous other points that have been debated.

Rule absolute.

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Monday, Nov. 2d.

TOWNLEY, Assignee of WRIGHT, a Bankrupt, *against* CRUMP and Another.

A party having goods in his own warehouse at *Liverpool* sold them, and gave the following delivery order to the vendee: — "We hold to your order 39 pipes," &c., "rent free to 29th *November* next." The goods remained in the same warehouse unpaid for till the vendee became bankrupt. In an action of trover for the goods by the assignee, evidence was given that, by the usage of *Liverpool*, goods sold while in warehouse are delivered by the vendor handing to the vendee a delivery order; and that the holder of such order may obtain credit with a purchaser as having possession of the goods.

Held that, as between the original vendor and vendee, the right of lien was not devested by giving such delivery order.

TROVER for wine, laying possession in the plaintiff as assignee. Pleas. 1. Not guilty. 2. That the plaintiff, as assignee, was not possessed, &c., concluding to the country. 3. As to the conversion of twenty-eight pipes and one hogshead, that, before the bankruptcy, and before the times when &c., viz. on &c., the defendants bargained and sold to *Wright*, the bankrupt, and he bought of them, the said twenty-eight pipes and one hogshead of wine, at the rate of &c., to be paid for by *Wright*'s accepting a bill of exchange in that behalf; that he accepted the same for the amount of the wines, payable at three months; that the bill was presented when due, but not paid; that the defendants, at the time of the bankruptcy, and at the times when &c., were and still are the holders of the said bill; that a large sum, viz. &c., the price of the said pipes and hogshead, was, at the time of the bankruptcy, and at the times when &c., and still is, unpaid to the defendants; and that the said pipes and hogshead were not delivered by the defendants to *Wright* at any time before or at or after the said sale; but the same, and each and every part thereof, at the time of the sale, were in the custody and possession of the defendants; and that they so continued and remained, from the time of the said sale continually, until and at and after the bankruptcy, and from thence continually until and at the said times when &c.; of all which (notice to plaintiff);

Also, that the bankrupt had not possession of the goods as reputed owner, with the consent of the true owner, within the meaning of stat. 6 G. 4. c. 16. s. 72.

plaintiff); whereupon and whereby the defendants acquired and had a lien upon the said pipes and hogshead for the said price thereof, and became and were entitled to retain the same until the said price should be fully paid and satisfied; wherefore, and because the said price, &c., at the said times when &c., was wholly due and unpaid, unsatisfied, and untendered to the defendants, they, when requested as in the declaration mentioned, refused to deliver the said pipes and hogshead to the plaintiff, and did, after the bankruptcy, at the said times when &c., retain and keep the same under and by virtue of the said lien, and as they lawfully might, &c., which keeping, &c., was the conversion in the introductory part of this plea mentioned. Verification.

Replication. 1. and 2. Similiter. 3. De injuriâ.

At the trial before Lord *Abinger* C. B., at the last Summer assizes at *Liverpool*, it appeared that the defendants, at the time of the transactions in question, were wine merchants at *Liverpool*; and that they sold the wine mentioned in the third plea to the bankrupt *Wright* on the 29th of *September* 1834, it being then held by the defendants in bonded warehouses which they had at *Liverpool*. An invoice was delivered at the time, stating the wine (described by marks and numbers) to be bought by *Wright* of *Crump* and Co., the price payable by acceptance at three months; which acceptance *Wright* gave. On the same 29th of *September* the defendants gave *Wright* the following delivery order: —

"*Liverpool*, 29th *September* 1834.

"Mr. *Benjamin Wright*,

"We hold to your order 39 pipes and 1 hhd. red wine, marked *J. C. J. M.* No. 41 a 67—69 a 80—pipes, No. 105 hhd., rent free, to 29 *November* next.

"*John Crump* and Co."

The

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The bill accepted by *Wright* was dishonoured, and the amount never paid. A fiat in bankruptcy issued against *Wright*, *January* 28th, 1835, and he was thereupon declared a bankrupt, and the plaintiff appointed assignee. A demand and refusal of the wine were admitted; as, also, "that the invariable mode of delivering goods sold while in warehouses in *Liverpool* is by the vendors handing to the vendees delivery orders."

For the plaintiff it was proposed to give evidence, that the order in question was equivalent to an accepted delivery order; but the Lord Chief Baron held such evidence inadmissible. The plaintiff's counsel then called Mr. *Preston*, a broker and merchant, who held bonded vaults in *Liverpool;* and he stated that the practice was to deliver goods while in warehouses by handing delivery orders, which were not usually given until payment, or something equivalent, had been received for the goods; that such orders varied in their form; that delivery orders were given resembling that in question; and that in his opinion the present order would obtain credit for the holder with a purchaser. He was proceeding to state that he should consider the possession of such an order possession of the property; but the Lord Chief Baron refused to admit this evidence. The witness, however, said that, as a matter of custom, the goods specified in such a delivery order would be considered the property of the person holding the order. It was not stated that the defendants had made any transfer in their books. The Lord Chief Baron was of opinion that no sufficient delivery was shewn to devest the lien of the defendants: he observed that the giving of an invoice, or bill of lading, does not take away the right to stop in transitu, if there has been no actual

actual delivery of the goods; and he directed a nonsuit, giving leave to move to enter a verdict for the plaintiff for the value of the twenty-eight pipes and one hogshead.

Cowling now moved (*a*) that such verdict might be entered, or a new trial had. The facts admitted and proved shewed a constructive delivery to *Wright* before he became bankrupt. It is clear that, if the wine, instead of being the property of the warehousemen in whose vaults it was, had belonged to a third person, who had sold it to the bankrupt, and had given him such delivery order upon the warehousemen, the handing of such order to them by the buyer would have been a constructive taking possession by him, and the order could not have been countermanded; *Abbott on Shipping*, part 3. c. 9. s. 15. *b.* (*b*). So it would have been also in the present case, if *Wright* had sold to another person, and the defendants had given a delivery order to such person. *Stoveld* v. *Hughes* (*c*) and *Green* v. *Haythorne* (*d*) shew this; but the present case is a stronger one in favour of the vendee's right. In a note to the fourth *American* edition of *Abbott on Shipping* (by the Hon. *Joseph Story*, one of the Judges of the Supreme Court of the United States,) it is said (*e*); "and where goods are sold, lying in the vendor's warehouse, on credit, and they are sold by marks and numbers, so that no farther designation is necessary, and it is a part consideration of the bargain that they may remain there, rent free, at the option of the vendee, and for his bene-

(*a*) Before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.
(*b*) Page 379. 5th ed. (*c*) 14 *East*, 308.
(*d*) 1 *Stark. N. P. C.* 447.
(*e*) Page 381, note (1), to part 3. c. 9. s. 15. *b.* *Boston*, 1829.

fit,

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fit, until the vendor shall want the room, there is in point of law a complete delivery of the goods, and the transit is ended, as much as if the goods were in the warehouse of a stranger." And *Barrett* v. *Goddard* is cited from *Mason's* (*American*) *Reports* (*a*). [Lord *Denman* C. J. I do not know that we can allow these works to be cited as authorities, though Mr. Justice *Story* is a very able commentator, and it would be desirable to find that the *American* authorities agreed with the opinion we may form. *Patteson* J. You maintain here that the possession is changed by a delivery order which the vendor makes upon himself. No custom going to such an extent as that was recognised in *Dixon* v. *Yates* (*b*).] The question did not arise in that case; the delivery orders there mentioned were drawn by the vendor on the warehouseman: here the vendor and warehouseman are the same person, and therefore the delivery orders are in the nature of accepted delivery orders. It is plain from *Abbott*, as before cited, that if the vendor had given the bankrupt a delivery order addressed to and accepted by the vendor's agent, the warehouseman, the possession would have been changed; and there seems no reason for a distinction, where the vendor acts as his own warehouseman and agent. *Stoveld* v. *Hughes* (*c*) and *Green* v. *Haythorne* (*d*) do not authorise such a distinction. The ground of decision in those cases is, that the facts shew an executed delivery. And, further, it would be a fraud upon the public if a purchaser

(*a*) 3 *Mason's Reports of Cases argued and determined in the Circuit Court of the United States*, p. 107. *Boston*, 1828. The judgment cited was delivered by *Story* J.

(*b*) 5 *B.* & *Ad.* 313.

(*c*) 14 *East*, 308.

(*d*) 1 *Stark. N. P. C.* 447.

might

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might go into the market with the symbol of property, which these orders clearly are, and yet should be liable to have the contract of sale to him rescinded. The holder of such an order has what amounts to a reputed ownership of the goods. A delivery order is not like a bill of lading, which merely serves to shew who is the owner: holding a delivery order is having actual possession. Its effect is like that of a dock warrant, as stated in *Spear* v. *Travers* (*a*) and *Lucas* v. *Dorrien* (*b*). The words "rent free" in the delivery order shew that the defendants, on giving it, considered themselves as becoming merely warehousemen for the bankrupt. At all events it should have been left to the jury, whether or not the facts amounted to a taking of possession. The delivery order was entirely a mercantile instrument, the effect of which they were competent to judge of.

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day of the term (*November* 19th), delivered the judgment of the Court. After referring to the facts above stated, as to the custom with respect to delivery orders, his Lordship said: There was a total failure of proof that, where a vendor who is himself the warehouseman sells to a party who becomes bankrupt before the goods are removed from the warehouse, the delivery order operates, by reason of this custom, to prevent a lien from attaching; and I think it is not contended that there is any general usage which could devest this right in such a case, upon the insolvency of the vendee. Cases have been cited, but none where the question arose between the original

(*a*) 4 *Camp.* 253, 4. (*b*) 7 *Taunt.* 278. (judgments of the Court).

vendor

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vendor and vendee. As to reputed ownership, it is quite clear that the seventy-second section of stat. 6 *G.* 4. *c.* 16. would not apply, for it refers to cases where the bankrupt shall "by the consent and permission of the true owner" have goods in his possession. Here the bankrupt, if he had possession, was himself the true owner, under the contract of sale. There will therefore be no rule.

Rule refused.

Monday, Nov. 2d.

SMITH *against* ELDRIDGE.

In an action for work, labour, and materials, the plaintiff delivered a particular, claiming 1303*l.*, and stating that the full particulars could not be comprised in three folios. On summons for a better particular, with dates and credits, the plaintiff said he had no credits to give, and the summons was dismissed. The cause was afterwards referred, with all matters in difference; the costs to abide the event of the award. The plaintiff, in opening his case before the arbitrator, admitted payment of several sums, and claimed only 400*l.* The arbitrator awarded 63*l.* to the plaintiff for his alleged causes of action, and 9*l.* to the defendant for matters not in question in the suit.

Held, that the Court could not stay the taxation of the plaintiff's costs and order each party to pay his own.

Per *Patteson* J. A plaintiff is not bound, in his particular, to state the items of reduction which he admits; it is sufficient if he states the items of his own demand, and the amount admitted as going in reduction.

THESIGER moved for a rule to shew cause why the taxation of the plaintiff's costs in this cause should not be stayed, and why each party should not pay his own. The amount of debt indorsed on the copy of the writ of summons was 1303*l.* A declaration was delivered, with a particular, stating that the plaintiff claimed 1303*l.* for work, labour, and materials, found and provided in the building of a certain messuage, &c.; the full particulars of which could not be comprised in three folios. The defendant took out a summons, calling on the plaintiff to shew cause why he should not deliver "a further and better account in writing, with dates and credits, of the particulars of the plaintiff's demand." On the attendance before *Coleridge* J., the defendant's attorney said

that

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that the greater part of the plaintiff's claim had been paid; and he relied upon the sixth section of *Reg. Gen. Trin.* 1 *W.* 4 (*a*). The plaintiff's attorney stated that he had no credits to give; whereupon the learned Judge said that he could not try the cause, and dismissed the summons. The cause, and all matters in difference, were referred at nisi prius, the costs to abide the event of the award. The plaintiff's attorney, in opening his case before the arbitrator, stated that the defendant had paid the plaintiff several sums on account, and that the plaintiff claimed 400*l.* as the balance. The arbitrator awarded that the defendant was indebted to the plaintiff in the sum of 63*l.*, and no more, for the matters in the declaration mentioned; and that the plaintiff was indebted to the defendant in the sum of 9*l.* for goods sold and delivered, in addition to the monies due and allowed to him by the arbitrator in this action. The defendant now stated, on affidavit, that, if the plaintiff had originally claimed only the amount awarded, he should not have defended the action, for that the plaintiff was in insolvent circumstances. *Thesiger* now cited *Adlington* v. *Appleton* (*b*); admitting, however, that a difficulty would arise if the Court should think the present case analogous to those in which a cause has been referred to arbitration, the costs to abide the event, and, after an award in the plaintiff's favour, the defendant has moved for costs under stat. 43 *G.* 3. *c.* 46. *s.* 3., which the Court has not granted (*c*); but he denied that any analogy could be drawn between a case decided on the particular words of that statute and one turning upon the Rule in question, on which the Court might exercise a discretion.

(*a*) 2 *B. & Ad.* 788. (*b*) 2 *Comp.* 410.
(*c*) See *Holder* v. *Raitt*, 2 *& E.* 445.

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[*Patteson* J. The case in *Campbell* has been misunderstood. It has been inferred from it that the plaintiff was bound to give the items which he admitted as reducing his demand: but that has been long overruled. The practice at chambers is, that the plaintiff states the items of his own demand, the amount by which he admits it to be reduced, and the balance for which he really proceeds. Lord *Denman* C. J. The defendant here should have tendered what was actually due. He knew what he had paid.] But not what the plaintiff insisted upon.

Lord DENMAN C. J. I think we have no power to grant this rule. The arbitrator has decided the whole case upon the merits, and, in so doing, has determined this particular right.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

Rule refused.

Monday, Nov. 2d.

BARLOW and Wife *against* LEEDS.

A. gave a promissory note to *B.* and *C.* jointly, for money lent to him, one half by each. *B.* died, and *A.* took out administration, with the will annexed, to her effects. *C.* sued him on the note. *C.* was a legatee, and was charged by *A.* with having goods of the testatrix in her hands. On motion to stay proceedings in the action, upon *A.* paying half the principal and interest of the note into Court, and giving *C.* a discharge for the residue:

Held, that the case was not one in which this Court, by virtue of its equitable jurisdiction, could interfere.

MRS. *BARLOW*, while single, and her sister, advanced 50*l.* each to the defendant, their brother, for which he gave his note for 100*l.* to them jointly. The sister died, and the defendant took out administration with the will annexed. The surviving sister and her husband

sued

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BARLOW *against* LEEDS.

sued him on the note. The defendant paid half the principal and interest into Court under a judge's order, to abide the event of an application to this Court, and offered the plaintiffs a discharge for the other half, to which he claimed an equitable title as administrator. Mrs. *Barlow* was a legatee under the will; and the defendant alleged that she and her husband had effects of the testatrix in their hands, which they had refused to give up.

Kelly now moved, on affidavits stating the above facts, and others which it is unnecessary to set forth, that proceedings might be stayed, the defendant giving such discharge as above mentioned. If the plaintiffs recover the whole 100*l.*, they will be trustees for the defendant as to one half, and he will be obliged to sue them in equity. And the affidavit shews grounds for apprehending that, if the plaintiffs obtain possession of this sum, the half may not easily be recovered back. The defendant is willing to pay such costs as the Court may think reasonable. [Lord *Denman* C. J. Is there any case in which the Court has consented to such an application?] None has been found, but the Court has an equitable jurisdiction, which it will exert, if there are no disputed facts, to prevent an obvious injustice.

Lord DENMAN C. J. Can we go into such an enquiry as this on affidavits? It would be trying the merits of a suit in equity. We cannot do it.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

Rule refused.

Tuesday, Nov. 3d.

CANN *against* FACEY.

Where a Judge has certified to deprive of costs under stat. 43 *Eliz. c.* 6. *s.* 2. in a case within the statute, the Court cannot order the plaintiff's full costs to be taxed notwithstanding the certificate, on the ground that the Judge gave an erroneous reason for certifying.

TRESPASS for shooting a dog. Plea, that certain persons broke and entered defendant's closes or lands, and with dogs trampled upon and destroyed his growing crops; that defendant, upon their leaving the closes, gave the said persons notice that, if the said dogs or any of them came upon the said closes again, he would shoot them; that the said persons, not regarding such notice, suffered and permitted the said dogs again to enter the said closes and trample upon and destroy the crops; wherefore defendant for the causes aforesaid, and because he could not otherwise prevent the said dogs from further trampling &c., did shoot at and wound one of the said dogs so being on the said land and trampling upon the said crops, as he lawfully &c., and that the same is the dog mentioned in the declaration. Replication, de injuriâ. On the trial before *Gurney* B. at the last *Exeter* assizes, evidence was given on both sides, as to the matter of justification. The jury found a verdict for the plaintiff; damages twenty shillings. Application was afterwards made to the learned Judge to certify under stat. 43 *Eliz. c.* 6. *s.* 2. on the ground that the plaintiff might have proceeded under the malicious trespass act, 7 & 8 *G.* 4. *c.* 30. *s.* 24. The learned Judge accordingly certified, stating in court that he did so for the above reason.

Crowder now moved for a rule to shew cause why the Master should not tax to the plaintiff his full costs notwithstanding

withstanding the certificate(*a*). The learned judge certified under a mistaken apprehension as to sect. 24. of the Malicious trespass act. That section contains a proviso, excluding from its operation "any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of." If therefore the plaintiff had gone before a magistrate, his complaint would not have been entertained. If a judge certifies without giving any reason, the Court may not have power to interfere; but it is otherwise if he gives an erroneous reason. [*Coleridge* J. How can you get over the words of stat. 43 *Eliz. c.* 6. *s.* 2., that, if it shall be signified or set down by the judge before whom the cause was tried, that the damages shall not amount to forty shillings, the judges before whom any such action shall be pursued, "shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretion." If, indeed, it appeared that the judge had certified in a species of action which is excepted by the statute, the question would be different.] The judge who tries the cause has a discretionary power as to certifying, but he must exercise it within legal bounds. The judgment of an arbitrator in his award is conclusive, if he states no reason, but not if he states a wrong one. If it is apparent that the judge, in certifying, has exercised his discretion under a mistake of the law, there is nothing in the statute of *Elizabeth* to prevent the Court from rectifying this, like any other

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CANN *against* FACEY.

(*a*) Also to increase the damages to 50*s.*, or for a new trial, on the ground that the verdict, as to amount of damage, was against evidence. Rule refused.

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CANN against FACEY.

mistake of a judge or jury. In a case mentioned in *Twigg* v. *Potts* (*a*), this Court is said to have referred a certificate back to the learned Judge who made it.

Lord DENMAN C. J. There is no foundation for a rule. The words of stat. 43 *Eliz. c.* 6. *s.* 2. are (His Lordship here read the section.). In this case, the learned Judge who tried the cause has certified under the statute: and when the Judge certifies there is an end of the question. We cannot increase the damages; and we cannot enquire under what influence he exercised the discretionary power vested in him. Perhaps in this case it might have been a strong proceeding on the part of the learned Judge to refuse certifying.

PATTESON J. I am of the same opinion. I always understood that under the statute of *Elizabeth* the Court never interfered with the discretion of the Judge, but would only enquire whether or not he had the power to certify at all.

WILLIAMS and COLERIDGE Js. concurred.

Rule refused.

(*a*) 4 *Dowl. P. C.* 266.

HOOPER *against* STEPHENS and Wife.

Tuesday, Nov. 3d.

Where it has been agreed between debtor and creditor that the latter shall receive goods in reduction of his demand, the delivery of such goods operates as a payment within stat. 9 *G.* 4. *c.* 14. *s.* 1., to bar the statute of limitations.

ASSUMPSIT for the price of hay sold to the wife before marriage. Pleas, non assumpsit, and the statute of limitations. On the trial before Lord *Denman* C. J., at the *Gloucester* Summer assizes, 1835, the plaintiff, to take the case out of the statute, proved that, after the delivery of the hay, and within six years of the commencement of this action, the wife (who was then single, and kept a public-house) said to the plaintiff, "Mr. *Hooper*, you must make use of some spirit, I know; why not have it of me? As long as I owe you money for hay, if it is ever so little it will be a way to lessen the debt." The plaintiff said he would take a gallon of gin at 12*s.*, and a jar filled with gin was sent to him. It was contended that this delivery of goods by the wife was equivalent to a part payment, and barred the statute; and *Hart* v. *Nash* (*a*) (in the Court of Exchequer) was referred to. On the other hand, it was urged that the delivery could not operate as a *payment*, inasmuch as the defendants, if now suing for the price of the spirits, could only declare as for goods, and not for a liquidated sum of money. The Lord Chief Justice gave leave to the defendants to move to enter a nonsuit; and the plaintiff had a verdict.

Ludlow Serjt. now moved according to the leave reserved. The plaintiff must rely upon the clause in

(*a*) 2 *Cro. M. & R.* 337.

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HOOPER *against* STEPHENS.

Lord *Tenterden*'s act, 9 *G.* 4. *c.* 14. *s.* 1., which provides that nothing therein contained "shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." To bring this case within the proviso, there ought to have been what is technically and properly called a payment; such as might formerly have been given in evidence under the general issue. This transaction was not such a payment. [Lord *Denman* C. J. *Hart* v. *Nash* (*a*) appears to be in point.]

The Court (*b*) took time to enquire as to the decision in *Hart* v. *Nash* (*a*), which was not yet reported; and, in the same term (*November* 7th),

Lord DENMAN C. J. said: *Hart* v. *Nash* (*a*), decided in the Court of Exchequer, rules the present case. Where any thing is received, upon agreement, in reduction of a debt, that is a payment sufficient to take the debt out of the statute of limitations.

Rule refused.

(*a*) 2 *Cro. M. & R.* 337.

(*b*) Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

GAMBRELL *against* The Earl of FALMOUTH and AUSTIN.

Tuesday, Nov. 3d.

CASE for taking an excessive distress for 5*l.* 10*s.*, whereas only 1*l.* 8*s.* was due. Plea, that the whole was due and in arrear (not stating for what time), concluding to the country. Similiter. On the trial before Lord *Denman* C. J., at the last *Berkshire* assizes, it appeared that the plaintiff held the premises, on which the distress was made, as weekly tenant, of the defendant, the Earl of *Falmouth*, originally at a rent of 2*s.* 6*d.* per week; and that, on the 30th of *June* 1834, Lord *Falmouth* gave the plaintiff notice to quit, or to pay double rent; that Lord *Falmouth* afterwards gave a second notice to the defendant to quit on the 8th of *December* 1834, or to pay double rent, namely 10*s.* per week; that, on the 6th of *Februrary* 1835, he levied a distress for 4*l.*, being eight weeks' rent at 10*s.*, due from the 8th of *December* to the 2d of *February*, and being stated, in the warrant and notice, to be for rent due up to the latter day. The plaintiff brought an action for this distress, as excessive, and recovered judgment. On the 27th of *April* 1835, the defendant *Austin* levied the distress for which the present action was brought, on a warrant for 5*l.* 10*s.*, being rent in arrear on the 22d of *April*, and it was shewn that he stated this to be for rent due since the last distress. The Plaintiff's counsel contended that the distress was not authorized by stat. 4 *G.* 2. *c.* 28. *s.* 1. In answer, the defendants offered proof that there were arrears

To a declaration for an excessive distress for rent, defendant pleaded that the whole sum distrained for was due and in arrear, concluding to the country, on which plaintiff joined issue: Held that, on this issue, defendant was not precluded from insisting on certain arrears, by the fact that, since they became due, other arrears had become due and had been distrained for. And this, although, on the first distress, the warrant and notice stated the distress to be for rent due up to a day named, being subsequent to those on which the arrears now in question accrued; and although, on the second distress, the defendant stated that it was for rent due since the last distress.

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arrears of rent unsatisfied, which had accrued on days antecedent to the accruing of those arrears which were distrained for on the 6th of *February* 1835; and that such previous arrears made up the 5*l.* 10*s.* at the rate of the original rent. The plaintiff's counsel contended that these could not be taken into account; but the Lord Chief Justice received the evidence, and the defendant had a verdict.

Ludlow Serjt. now moved for a new trial. Although it is competent to a landlord to distrain on one account, and avow on another, yet that principle is inapplicable to a case where the complaint is that too much has been distrained for. The distress on the 6th of *February* 1835 must be considered as having the effect of a statement of account by Lord *Falmouth*, up to that day. "It is the duty of a landlord to make a distress, at once, for his whole rent, if he can find sufficient goods on the premises; for various distresses are vexatious to the tenant. And, therefore, at the common law, if the landlord made an insufficient distress when he might have taken more, a second distress for the remainder of the same rent was illegal: for it was his own folly not to have taken enough at first; but if it appeared that he could not find a sufficient distress on the land, then it seems, that even at the common law, he might distrain again." *Bradby on Distresses*, ch. 5. p. 130. (*a*). The statute 17 *Car.* 2. *c.* 7. *s.* 4. enables the landlord, in the cases there pointed out, to make successive distresses, if the distress shall not be found to be of the full value of the arrears distrained for; but it

(*a*) Citing *Wallis* v. *Savill*, 2 *Lutw.* 1536. *Anon. Cro. Eliz.* 13.

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is not pretended here that such was the case on the first occasion, or that there was not then a sufficient distress on the premises for all the arrears claimed at the time.

PATTESON J. No doubt a man is not entitled to distrain at different times for a rent due on the same day. But if rent become due at different times, he may distrain separately. Independently of that, look at this issue. The question is, whether the sum was in arrear or not. If it is not satisfied, it is still in arrear.

WILLIAMS J. I understand the objection to be that, because the defendants assumed to distrain for rent not proved to be due, they were precluded from justifying themselves by shewing that there was other rent in arrear. I do not see why they are to be prevented from shewing that rent was in arrear, different from that for which they at first claimed.

COLERIDGE J. The objection, if there be one, is to the reception of the evidence. But what is the issue? Whether so much is due and in arrear. I cannot conceive why arrears are not to be taken into consideration, because there has been a distress, since they accrued, under which they were not satisfied. It may be very true, that the landlord thought he had covered all the arrears by the first distress. But that is not to prevent him, under this issue, from shewing what was really due.

Lord DENMAN C. J. The issue is, how much was due? The objection now raised is, that the defendants cannot say that more was due at the former period, than

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than they then claimed. That objection does not apply, as the pleadings stand. There seems to me to be no ground of complaint, either in law or in justice.

Rule refused.

Wednesday, Nov. 4th.

DOE on the Demise of BENJAMIN PREEDY, *against* HOLTOM and Another.

Devise to *A.* of the messuage in *S.* in which testator resided, with the buildings *to the same adjoining*, and all those several closes in *S.* aforesaid, called *C.*, *D.*, and *E.*, (with the brick-kiln erected thereon,) and *F.*, with their appurtenances, *part of the farm and lands then in testator's own occupation.* Devise, further, to *B.* of a second messuage, and of all other the testator's lands and hereditaments in *S.* except those before devised to *A.* Under this will, *B.* claimed two cottages in *S.* which, when the will was made, adjoined the messuage resided in by the testator, but were not in his occupation, and were divided by a wall, which he had built, from the messuage.

Held, that the words referring to the testator's own occupation applied only to the premises mentioned after the words "to the same adjoining;" that evidence was admissible to shew the situation of the premises, and by whom they were occupied; but that those facts, being proved, did not raise such an ambiguity as warranted the reception in evidence of declarations made by the testator when giving instructions for his will, to shew that he intended *B.* to have the cottages.

THIS ejectment was tried before *Williams* J. at the *Oxfordshire* Summer Assizes, 1836. The premises claimed were two cottages, with gardens, outhouses, &c., at *Swalcliffe*, *Oxfordshire*. The defendants made title under *Joseph Preedy*, the elder brother of the lessor of the plaintiff. Both brothers claimed the premises in question under the will of their father.

The testator, by his will, produced at the trial, devised to trustees all his real estate, upon trust that his said trustees and the survivor of them and the heirs of such survivor should, during the minority of his eldest son *Joseph Preedy*, receive the rents and profits of all that messuage or tenement in *Swalcliffe* aforesaid *wherein he the said testator then resided*, with the offices, outhouses, barns, stables *and other edifices and buildings, yards and gardens, to the same adjoining*, and all those several closes or enclosed grounds, pieces and parcels of land lying and being in *Swalcliffe* aforesaid, called or

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known by the several names of *Cow House, Trenchill, Lower Trenchill, Fernhill,* Close taken out of *Trenchill,* together with the brick kiln erected thereon, and the *Farhill,* with their appurtenances, *part of the farm and lands then in his own occupation,* as the same should become due, and did and should stand and be possessed of such rents, issues, and profits, upon the trusts and for the intents and purposes therein-after expressed and declared concerning the same; and, when and so soon as his said son *Joseph Preedy* should have attained the age of twenty-one years, then did and should be seized of and in all that his said messuage or tenement in *Swalcliffe* aforesaid wherein he then resided, with the offices, out-houses, barns, stables, and other edifices and buildings, yard and garden to the same adjoining, and the said several closes or inclosed grounds, pieces and parcels of land in *Swalcliffe* aforesaid last therein-before particularly mentioned, with their appurtenances, in trust for his said son *Joseph Preedy,* his heirs and assigns for ever.

And upon further trust that they the said trustees and the survivor of them, and the heirs of such survivor, did and should, during the minority of his, the said testator's, son *Benjamin Preedy,* receive the rents, issues, and profits of all that his messuage or tenement in *Swalcliffe* aforesaid called the *Old Grange,* with the offices, out-houses, and other edifices and buildings, yard and garden, to the same adjoining, and *all and every other his closes or inclosed grounds, pieces and parcels of land, and other hereditaments, in* Swalcliffe *aforesaid,* with their appurtenances, *except what he had therein-before devised to or in trust for the use of his eldest son Joseph Preedy,* as the same should become due: and did and should stand and

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and be possessed of such rents, issues, and profits, upon the trusts, and for the intents and purposes therein-after expressed and declared concerning the same; and when and so soon as his said son *Benjamin* should attain his age of twenty-one years, then upon trust that they his said trustees or the survivor of them, or the heirs of such survivor, did and should stand and be seized of and in all that his said messuage or tenement in *Swalcliffe* aforesaid, called the *Old Grange*, with the offices, out-houses, and other edifices and buildings, yard and garden to the same adjoining, and all and every his said closes or inclosed grounds, pieces and parcels of land and other hereditaments in *Swalcliffe* aforesaid, last therein-before mentioned, with their appurtenances, in trust for his said son *Benjamin Preedy*, his heirs and assigns for ever.

The question at the trial was, whether the cottages with the gardens &c. passed to the trustees for *Joseph* under the first part of the will, or for *Benjamin* under the subsequent devise of all the closes and hereditaments not before devised. For the plaintiff, evidence was given that the testator lived in the messuage at *Swalcliffe* at the time when he made his will; that the cottages had formed part of the *Swalcliffe* farm, but that the testator had separated them from it by a wall, and that, before and at the time when the will was made, they were so separated, and were in the occupation of tenants. It was further proved, for the plaintiff, that there were cottages on the *Swalcliffe* estate, a quarter of a mile from the place where the testator resided. Evidence was also given as to the comparative value of the *Swalcliffe* and *Grange* properties. And, for the purpose of shewing that the testator intended the two

cottages

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Doe dem. Preedy against Holtom.

cottages in question to pass under the second, and not the first clause of his will, the plaintiff's counsel proposed to prove certain declarations made by the testator, when giving instructions for his will: but this evidence was objected to, and excluded. The learned judge in summing up told the jury that the question was one of law, and that in his opinion the cottages adjoining the *Swalcliffe* farm passed to *Joseph* by the will; but that the plaintiff should have leave to move to enter a verdict for him if the Court of King's Bench should hold, upon the facts proved, that the words of the devise were not sufficient to pass the premises in question to the trustees for *Joseph*'s use. The defendants had a verdict, and leave was given to move.

Ludlow Serjt. now moved that a verdict might be entered for the plaintiff, or a new trial had on account of the rejection of evidence. The cottages passed to the trustees for *Benjamin*, the lessor of the plaintiff, by the residuary clause. It is true they may be said to adjoin the tenement on which the testator dwelt, according to the first clause, but that requires, not only that the buildings, &c., which are to pass for the benefit of *Joseph* shall adjoin the testator's residence, but also that they shall have been "part of the farm and lands in his occupation" at the time when he made his will. If there is a doubt as to the meaning, *Benjamin*, who, as the residuary legatee, stands in the situation of an heir at law, is entitled to a construction in his favour: nothing is to be taken from him unless expressly devised. As to the evidence; extrinsic evidence was admitted in explanation of the will, and from that a difficulty resulted, which required further

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Doe dem. PARRY against HOLTOM.

further parol evidence to explain it; for it appeared that the premises "adjoining" those inhabited by the testator were not "in his own occupation." This is one of the cases in which *Tindal* C. J. lays it down, in *Miller* v. *Travers* (*a*), that "the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence, upon the same subject, calculated to explain what was the estate or subject matter really intended to be devised." [*Williams* J. The extrinsic evidence adduced was only for the purpose of shewing the situation and divisions of the property, and the manner in which it was occupied; there was nothing beyond that, to introduce evidence of declarations. *Patteson* J. The declarations were offered to shew what was meant by the will; the other evidence only shewed what was within the terms of the will. Lord *Denman* C. J. Evidence might be given to shew what were the parcels. That evidence, in the present case, did not introduce any ambiguity. It was as if the testator had said "I devise my cottages," and you had offered evidence of declarations by him that he meant his house in *London*.] The evidence which it was here proposed to offer was, that the testator directed his will to be so framed as to pass the cottages to the use of *Benjamin*.

Lord DENMAN C. J. The testator devises to the trustees for *Benjamin* all his closes, pieces of land, and other hereditaments in *Swalcliffe*, except what he has before devised to or in trust for the use of his eldest son. What has he so devised? The rents and profits

(*a*) 8 *Bing.* 247

of

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Doe dem. PREEDY against HOLROM.

of the messuage in *Swalcliffe* wherein he resided, with the offices "and other edifices and buildings, yards and gardens, to the same adjoining." Among these are the cottages in question. But he then gives some lands as "part of the farm and lands then in his own occupation;" and it is contended that this makes his own occupation a necessary part of the description of all that he gives to the eldest son. I think that is not so, but that part of what is given is adjoining to the residence of the testator, and part in his occupation. Then property is here shewn to exist, which precisely answers the terms of the will. Upon this point there is no doubt. The learned Judge, therefore, would not have been justified in receiving evidence of declarations for the purpose of shewing the testator's intention. The ambiguity was not raised which might have rendered such declarations admissible (*a*). If the testator gave instructions which have not been followed, that cannot now be helped.

PATTESON J. We are desired to read the will as if the words were "edifices and buildings to the same adjoining, and now in my own occupation." That, I think cannot be done. Extrinsic evidence must be received, for the purpose of shewing what a will refers to; but not to clear up a difficulty in the terms of the will. If the evidence here tendered had been admitted, it would have been for the purpose of shewing, that the language of the devise in question meant "adjoining, and now in my occupation." That would have been receiving evidence to construe the will.

(*a*) See *Richardson* v. *Watson*, 4 *B.* & *Ad.* 787.

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WILLIAMS J. concurred.

Doe dem. PARRY *against* HOLTOM.

COLERIDGE J. The only expression restricting the words "other edifices and buildings, yards, and gardens," is "to the same adjoining." The words "part of the farm and lands now in my occupation," refer to other premises. No ambiguity was raised here. Some extrinsic evidence is necessary for the explanation of every will. If the word *Blackacre* be used, there must be evidence to shew that the field in question is *Blackacre*. But here the declarations were offered in reality for the purpose of construing the expressions of the will, and giving them a more extended meaning than the words themselves bear.

Rule refused.

Thursday, Nov. 5th.

ROBINSON, Gent., One, &c. *against* GOMPERTZ.

An affidavit of service of notice on a creditor under the compulsory clause of the Lords' Act (32 *G.* 2. *c.* 28. *s.* 16.) is not sufficient if it state merely that the notice was left with the landlady of the house where he lodges; or with a person at the house where he resides, who afterwards stated that she acted as his servant, and had delivered it to him, she herself making no affidavit, and there being no affidavit of belief that the statement of such person was true.

A MOTION was made before *Littledale* J. in the Bail Court, that the defendant might be brought up under the compulsory clause (sect. 16.) of stat. 32 *G.* 2. *c.* 28. In the affidavit of service of notices, it was stated that a detaining creditor named *Treppass* had been served by leaving the notice with the landlady of the house where he lodged. *Littledale* J., on reference to a case in 3 *Dowl. P. C.* (*a*), held this insufficient.

(*a*) Probably *Gardner* v. *Green*, 3 *Dowl. P. C.* 343.

F. V. L

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ROBINSON *against* GOMPERTZ.

F. V. Lee now renewed the motion in this Court, on an amended affidavit stating that *Treppass* had been served with notice "by delivering the same to, and leaving it with, a female of the name of Miss *Wood*, at the house in which the said *Charles Stephen Treppass* resides, situate," &c., "and which said Miss *Wood* did, on this present 5th of *November*, inform this deponent that she acts as the servant of the said *Charles Stephen Treppass*, and that she did, on the said 10th day of *October* last, deliver the said notice to the said *Charles Stephen Treppass.*" [*Patteson* J. She might have made an affidavit herself. *Coleridge* J. It only appears by the statement she is said to have made, that she acts as servant. *Williams* J. You do not even allege that you believe it to be true.]

Lord DENMAN C. J. I think this is not enough, though I am sorry that a party should be defeated on such a point. An allegation of service in this form admits of the suggestion, that a person may have been collusively stationed at the house to receive the notice, and give the answer.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred (*a*).

Rule refused.

(*a*) DOE on the Demise of HUNGATE *against* ROE.

Saturday, January 31st 1835.

To make a rule absolute, on no cause being shewn, it is not sufficient that a deponent should swear to notice of the rule nisi having been left at the dwelling-house of the opposite party, in his absence, with a person who afterwards told the deponent that she had delivered the notice; the deponent must state that he believes this to be true.

SIR *F. Pollock*, Attorney-General, moved to make a rule absolute for staying proceedings till payment of costs in a former ejectment. The affidavit of service of the rule nisi stated that a copy had been left by the deponent at a house, with a female who described herself as the

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Doe dem. HUNGATE *against* ROE.

occupier, and who said that the lessor of the plaintiff and his wife both lodged there, but were at present out; and who, on seeing the notice directed to Lieutenant *Hungate*, said that the lessor of the plaintiff called himself Sir *William Hungate*; that she promised to deliver the notice; and that, two days afterwards, the deponent called again, and saw the same female, who said that the lessor of the plaintiff was out, and that she had delivered the notice to him. The deponent did not, however, swear to his own belief either that the delivery had taken place, or that the lessor of the plaintiff lived at the house in question.

Per Curiam. (Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* Js.). The affidavit does not go far enough. It is very important that we should enforce every security against collusion.

Sir *F. Pollock*, Attorney-General, then prayed that the rule might be enlarged.

Per Curiam. That is objectionable, because then you will gain the whole object of your rule. But you may add a fresh affidavit, and apply to a Judge at chambers.

The rule was afterwards made absolute, on the affidavit being resworn, with the addition that the deponent believed the delivery to have taken place.

Friday, Nov. 6th.

GYE, Assignee of MILLS, an Insolvent Debtor, *against* HITCHCOCK and Others.

An insolvent debtor executed a warrant of attorney, on which judgment was signed, and he afterwards went to prison. Subsequently his goods were seized and sold under a fi. fa. on the judgment, and the proceeds were paid to the judgment creditors. The insolvent petitioned, and his effects were assigned under the Insolvent Debtors' Act, 7 *G.* 4. *c.* 57.:

Held, that the assignee might recover the proceeds of the sale from the judgment creditors, as money had and received to the use of the assignee after the subscribing of the petition, on section 34. of the act.

ASSUMPSIT for money had and received by the defendants to the use of the insolvent after he had subscribed his petition. Plea, non assumpsit. On the trial before Lord *Denman* C. J., at the *London* sittings in last *July*, it appeared that, on the 12th of *September* 1834, the insolvent gave a warrant of attorney to the defendants, upon which judgment was signed on the 15th of *October*. On the 20th, the insolvent went to prison,

and

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GYE *against* HITCHCOCK.

and afterwards, on the same day, his goods were taken in execution upon a fi. fa. under the judgment: they were sold on the 23d of *October*, and the money paid to the defendants on the 31st. On a subsequent day the insolvent subscribed his petition to the Insolvent Debtors' Court; and on the 16th of *November* the assignment to the plaintiff was made. The action was brought to recover the proceeds of the sale. The defendants' counsel objected that they were not liable in this form of action; but the Lord Chief Justice ruled that the action lay, and a verdict was found for the plaintiff for the amount of the proceeds, his Lordship reserving leave to the defendant to move to enter a nonsuit.

Hoggins now moved accordingly. By the thirty-fourth section of the Insolvent Debtors' Act (7 *G.* 4. *c.* 57.), no person after the imprisonment shall avail himself of any execution issued on any warrant of attorney executed by the insolvent. The plaintiff was, therefore, entitled to treat the execution and sale as void, and might have brought trover for the goods, on the ground that no title passed to the defendants. But if he bring money had and received, this affirms the sale, according to the principle laid down by Lord *Kenyon* in *Smith* v. *Hodson* (*a*). [*Patteson* J. That was an action for goods sold and delivered, which of course affirmed the sale.] The money here could be had and received to no use but that of the judgment creditors. [Lord *Denman* C. J. Why are they to receive the proceeds from the sheriff?] There was no assignee at the time of the sale, and, therefore, the money at any rate

(*a*) 4 *T. R.* 217.

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could not be had and received to the use of the plaintiff. [*Patteson* J. The assignment has relation, as in bankruptcy.]

The Court (*a*)

Refused the rule.

(*a*) Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

Friday, Nov. 6th.

ROE on the several Demises of EDMUND WILKINS and JOHN WILKINS *against* JAMES WILKINS.

In ejectment, the defendant, upon notice from the plaintiff, produced a deed; and it was proved that the defendant's attorney had stated, before the trial, that the defendant claimed through that deed: Held, that this entitled the plaintiff to put it in, without proving the execution, before the defendant's case was opened.

EJECTMENT for premises in *Gloucestershire*. On the trial before Lord *Denman* C. J., at the last *Gloucester* assizes, it appeared that *Edmund Wilkins* claimed as administrator to *Joseph Wilkins* the elder, deceased; and that *John Wilkins* claimed as administrator to *Ann Wilkins*, deceased, the wife of *Joseph Wilkins* the elder. The title of *Joseph Wilkins* the elder rested upon a lease of the premises in question, made to *Ann Wilkins*, which the plaintiff had given the defendant notice to produce, and which was called for at the trial, and produced by the defendant. No evidence was given of the execution; but it was proved, on the part of the plaintiff, that the defendant's attorney had said, shortly before the trial, that the defendant claimed under the

A woman, living apart from her husband, obtained a demise of property for a term. The husband's representative brought ejectment against a party who claimed to have had adverse possession for more than twenty years, and who had obtained and held possession without knowing of the husband's existence: Held, that it was no misdirection to direct the jury to find for the plaintiff, unless they thought that such possession was adverse to the wife; inasmuch as, if adverse to the wife, it was adverse to the husband, and not otherwise.

lease.

1835.

Rex dem. WILKINS *against* WILKINS.

lease. The Lord Chief Justice was of opinion that this dispensed with proof of the execution; but he gave leave to move to enter a nonsuit. It further appeared that *Ann Wilkins* had married *Joseph Wilkins*, the father, in 1777, from whom she afterwards separated; and, her husband being still alive, married, or lived as wife with *Bryant*. After this, *Bryant* took into his occupation the premises in question, being a certain part of the waste of the manor of *Henbury*. He died in 1809. At the time of his death, *Joseph Wilkins* the younger, a son of *Ann Wilkins* and her first husband, was living with *Ann Wilkins*. She obtained a lease of the premises in question (being the lease above mentioned) from the lords of the manor of *Henbury*, conveying to "*Ann Bryant*, widow," a term of ninety-nine years from *March* 25th, 1812, determinable on certain lives, which were not extinct at the time of the trial; and she afterwards, in *March* 1813, gave up this lease to her son, signing, at the same time, the following memorandum, "*Joseph Wilkins* took to all that *Ann Bryant* had for maintaining of her and two children from *May* 10th, 1810, to *March* 25th, 1813." After this, *Joseph Wilkins* occupied the premises and built a house there. He afterwards went to *Demarara*, leaving the premises to be managed by the defendant, and died in 1821, devising them to him. The defendant had occupied them from the time when *Joseph Wilkins*, the son, left *England*, to the commencement of the present action. *Ann Wilkins* died in 1823; and *Joseph Wilkins*, the father, in 1826. It did not appear that *Bryant* or *Joseph Wilkins*, the son, had been aware of the existence of *Joseph Wilkins*, the father, from the time when *Ann Wilkins* began to live with *Bryant*. The Lord Chief Justice directed the jury to find for

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Roe dem. Wilkins against Wilkins.

the plaintiff, unless they were of opinion that the occupation by *Joseph Wilkins*, the son, and the defendant, was adverse to *Ann Wilkins*. Verdict for the plaintiff.

Ludlow Serjt. now moved to enter a nonsuit, or for a new trial on the ground of misdirection. First, it is true that, when a party produces a deed which has been called for, under which he himself claims, the other side may treat the execution of the deed as proved. But that principle is applicable only where it appears that the party producing rests his case, at the trial, on the validity of the deed. Here, the party producing, being the defendant in ejectment, was not called upon to shew any title till the plaintiff had proved a title. The plaintiff cannot assume, upon evidence of any thing passing out of Court, what the defendant's case is to be, for the purpose of relieving himself from the burthen of proof. Secondly, the Judge ought to have told the jury that the question was, whether the occupation was adverse to *Joseph Wilkins*, the father; for the plaintiff claims through him. In order to explain an occupation, and to shew that it is enjoyed under a recognition of the title of another claimant, it is necessary to shew some privity between the occupier and the claimant. Here it is attempted to infer a recognition, by the occupier, of a claimant whose existence he is ignorant of, from the mere circumstance that such unknown party has a legal claim in right of another person, whose title the occupier is supposed to recognise. Such a legal claim, unknown to all parties at the time, cannot constitute an implied acknowledgment.

Lord DENMAN C. J. It is clear that the lease was properly received in evidence without proof of its execution.

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Roe dem. WILKINS against WILKINS.

execution. *Knight* v. *Martin* (*a*) shews this. It did indeed appear, in that case, that both parties claimed under the same agreement: but extrinsic evidence was admitted to shew that fact; and the rule necessarily supposes that such a fact must be shewn by extrinsic evidence; for it could not appear from the inspection of the deed till the deed could be read. As to the second point, if the possession was adverse to the wife it was adverse to the husband. The husband had allowed her to enjoy the property, and took no part in the management of it. The jury considered that her permission to her son to live in it, in consideration of his supporting her, gave him no title adverse to her: and therefore he had no title adverse to her husband.

PATTESON J. I am of the same opinion. *Dallas* C. J., in *Knight* v. *Martin* (*a*), draws a distinction between cases where parties claim the same interest, and those where they claim adversely; but here the contending parties had clearly one common interest in the title created by the deed.

WILLIAMS and COLERIDGE Js. concurred.

Rule refused.

(*a*) *Gow's N. P. C.* 26.

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Friday, Nov. 6th.

PEPPER *against* WHALLEY.

Since the Rule (*Hil.* 4 *W.* 4.) that the entry of proceedings on the record for trial, or on the judgment roll, shall be taken to be, and shall be, the first entry of the proceedings upon record, it is not necessary to enter upon the Nisi Prius record a plea in abatement and judgment of respondeat ouster thereupon.

THE plaintiff declared in covenant, and the defendant pleaded in abatement, upon which plea the plaintiff had judgment of respondeat ouster. The defendant then pleaded non est factum, on which the plaintiff joined issue. The plaintiff made up the issue on the nisi prius record without any entry of the plea in abatement or the judgment thereon, and delivered it to the defendant with notice of trial. The defendant, before the assizes for which the notice was given, returned the issue to the plaintiff, saying that he should not accept it in its then form. The plaintiff afterwards redelivered the issue in the same state; and the defendant attempted to return it again, but the plaintiff refused to accept it. On the trial before *Taddy* Serjt. at the last *Chester* assizes, the cause was tried as undefended, and a verdict found for the plaintiff.

John Jervis now moved (*a*) (on affidavit) for a rule to shew cause why the verdict should not be set aside, on the ground of mis-trial, or why judgment should not be arrested. The rule is, that the nisi prius record must contain an entry of the plea in abatement and judgment, when there have been such proceedings. In *Dubartine* v. *Chancellor* (*b*) a judgment (*c*) was set aside on this

(*a*) Before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

(*b*) 5 *Mod.* 400. 12 *Mod.* 190. *Carth* 447. 1 *Ld. Raym.* 329.

(*c*) The *verdict*, according to the reports in Lord *Raymond*, in 12 *Mod.*, and in *Carthew*.

very

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very ground. It is true that, in an *Anonymous* case (*a*) which occurred afterwards, it was said, "the old course was to deliver in a copy of the whole record; *viz.* the declaration, plea in abatement, &c. and issue; but the Court made a rule for the future that a copy of the *narr.* and issue should only be paid for." But it appears that this rule did not prevail; for, in a later case, *Coombe* v. *Pitt* (*b*), an objection being made to the plea roll, that it omitted the mention of a plea in abatement, the Court, instead of holding that the entry of it was unnecessary, said that the irregularity had been cured by the defendant's accepting the issue on the nisi prius record, which was also without the plea in abatement. Here the issue was not accepted. The reason of the rule appears to be this; that the plea roll ought of course to contain all the pleadings; but, if the nisi prius roll do not contain the plea in abatement, there will be a variance between the two records. [*Coleridge* J. The old theory was that the nisi prius was a transcript of the plea roll. *Patteson* J. By the late rule, "the entry of proceedings on the record for trial, or on the judgment roll (according to the nature of the case), shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record" (*c*). There can be therefore no longer any variance.] That shews the importance of entering all the pleadings on the nisi prius roll; otherwise they will not appear at all. At any rate, it has never been understood that the entries on the nisi prius roll are to be confined to the issues which the jury are to try: the pleadings terminating in issues at law are always entered

(*a*) 1 *Salk.* 4. (*b*) 3 *Burr.* 1423, 1682.

(*c*) Reg. *Hil.* 4 *W.* 4. *General Rules and Regulations*, 15. 5 *B.* & *Ad.* vi.

there,

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PITCHER against WHALLEY.

there, even when they do not leave any thing to be inquired of by the jury. The rule now contended for is laid down in 2 *Chitty's Archbold*, *Pr. K. B.* book 2. part 1. (*a*)

Cur. adv. vult.

Lord DENMAN C. J., in the same term (*November* 25th), delivered the judgment of the Court.

This was a motion for a new trial, or to arrest the judgment, after verdict for the plaintiff; and the ground was that, there having been a plea in abatement and judgment of respondeat ouster, no entry of that plea and judgment was made on the nisi prius record.

The case of *Dobarteen* v. *Chancellor* (*b*), in 10 *W.* 3., was referred to, in which a judgment was set aside under similar circumstances, except that in that case the plea roll had the plea in abatement, but the nisi prius roll had not, and it should rather seem that the Court proceeded on this variance (*c*). At present, since the 15th rule of *Hilary* term 1834 (*d*), the nisi prius roll is the first entry on record, and therefore no such variance can exist.

In a subsequent case in 1 *Ann.*, *Anonymous* (*e*), it is stated that the Court altered the practice, and directed that, for the future, only the declaration and issue should be paid for; thereby making it unnecessary to enter the plea in abatement and judgment of respondeat ouster on the nisi prius record: and this appears to

(*a*) Page 572. 5th ed.

(*b*) 1 *Ld. Raym.* 329. 5 *Mod.* 400.

(*c*) See note (*a*) in the case in 1 *Ld. Raym.* 329. In the report, 12 *Mod.* 190., it is said that the entry was omitted in the *issue roll*; but this seems to mean the Nisi Prius record.

(*d*) 5 *B.* & *Ad.* vi.

(*e*) 1 *Salk.* 5.

be

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PERRIN against WEALANT.

be reasonable, for they are quite immaterial to the question ultimately to be tried between the parties.

In *Combe* v. *Pitt* (*a*) a similar objection was made; but, as the defendant had accepted the issue, the Court held that he had cured the irregularity, if any. In the present case it is stated that the defendant refused the issue, and that irregularity is not cured.

We are however of opinion that there is no irregularity, that the part of the proceedings omitted is wholly immaterial, and therefore no rule should be granted.

Rule refused.

(*a*) 3 *Burr.* 1682.

Saturday, Nov. 7th.

POOLEY *against* GOODWIN.

Defendant, being indebted to plaintiff in 150*l.*, and being employed by *T.* to perform works for which he was receiving a per centage, wrote an order to *T.* to pay plaintiff 150*l.* out of the first monies due to defendant. Afterwards, being indebted to *B.* in 997*l.*, he executed a deed reciting the above facts, assigning and transferring to *B.* such sums as then were or should become due to him, defendant, from *T.*, in trust, first to pay plaintiff the 150*l.*, and, secondly, to retain the residue towards payment of the 997*l.*; with covenants that he would not receive the money, nor revoke, &c., that he had right to assign, had not incumbered, and for further assurance. Defendant afterwards received 150*l.* from *T.*; and plaintiff sued him for money had and received, and on an account stated: Held,

1. That the action lay for the 150*l.*, though no proof was given of *T.*'s assent to the order; and though, at the time of making the order, nothing was due from *T.*; and though, at the time of making the deed, there was not 150*l.* due from *T.*, and it was, at such times, uncertain to what extent defendant would be employed by *T.*; and though plaintiff was not a party to the deed.

2. That plaintiff was entitled to give secondary evidence of the order, upon proof of a bonâ fide search for the original among plaintiff's papers only.

3. That such secondary evidence was furnished by a paper, admitted by defendant's attorney to be a true copy of an affidavit sworn, but not filed, by defendant in proceedings against another party, such paper stating the order to have been written by defendant, and setting it out, though no evidence was given that the attorney had compared the paper with the original affidavit or order.

4. That, on such secondary evidence it must be presumed that the order was properly stamped.

5. That the deed was not a mortgage, but an absolute assignment of the defendant's earnings.

6. Upon its appearing that, at and since the time of executing the deed, less than 500*l.* was due from *T.* to defendant, and that not so much as would make up 500*l.* was likely to be earned from that time to the conclusion of defendant's employment with *T.*: Held, that the deed required no more than a 3*l.* stamp, under stat. 55 *G.* 3. *c.* 184. Sched. Part. I. tit. *Conveyance.*

ASSUMPSIT for money had and received, and on an account stated. Plea, non assumpsit. The action was brought in pursuance of a rule of court made under the interpleader act, stat. 1 & 2. *W.* 4 *c.* 58. *s.* 1. On the trial before Lord *Abinger* C. B., at the last *Liverpool* assizes, the following case was opened for the plaintiff. The defendant was an architect employed by the Commissioners for paving and lighting *Manchester*, to build a new town hall. He was to receive a commission of seven and half per cent on the money expended: and this per centage he regularly drew for and obtained up to 1829. In that year he became indebted to the plaintiff to the amount of 150*l*; and, on being pressed for payment, he wrote the following

letter

letter to Mr. *Thorpe*, then comptroller for the Commissioners: —

"Sir,

"I hereby authorise you to pay to *John Pooley*, Esq. sen. 150*l.* from my commission as architect to the town hall of *Manchester*, out of the first monies ordered to be paid to me. His receipt shall be a sufficient discharge for the same, this being the balance of account between *John Pooley* and myself, as settled this day, the 22d of *September* 1829.

(Signed) "*Francis Goodwin.*"

"To *John Thorpe*, Esq. Comptroller."

On the 15th of *July* 1830, the defendant executed a deed of assignment to *John Vaughan Barber* and *William Marshall*, whereby, after reciting that he was indebted to the plaintiff in 150*l.* and that he was indebted to *Barber* and *Marshall* in 997*l.* 8*s.* 11*d.* for money advanced and lent to him and paid for his use, and interest thereon, and that he, the defendant, was employed by the above mentioned Commissioners as architect, &c. and that, being unable to pay the said debts, he had agreed to assign to *B.* and *M.* all and singular the sum and sums of money which was or were then, or should thereafter become, due to him for his commissions, charges, and expenses as such architect, the defendant assigned and transferred to *B.* and *M.* all and every the sum and sums which then was and were or should at any time thereafter become due from and payable by the Commissioners to him the defendant, for or on account of his commission, &c.; upon trust, first to pay the costs, and then to pay the 150*l.* due to the plaintiff, and to retain the residue towards payment of the debt

of

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of 97*l.* 8*s.* 11*d.* and the interest thereon. The deed contained a power of attorney to *B.* and *M.*, and covenants by the defendant to pay the 997*l.* 8*s.* 11*d.*; that he would not receive the money nor revoke the power, nor do any act whereby *B.* and *M.* might be hindered in recovering payment; that he had not done any act to incumber; and for further assurance. The defendant was afterwards arrested, and, in *April* 1832, was discharged under the Insolvent Debtors' Act. He admitted (*a*), on the trial, that he had received 150*l.* from the Commissioners since his discharge. The plaintiff did not produce the order of 22d of *September* 1829; but shewed that diligent search had been made for it among his papers. It was contended that this did not let in secondary evidence of the contents; but the Lord Chief Baron overruled the objection. The plaintiff then put in a paper purporting to be an affidavit by the defendant, made in the King's Bench, entitled between the defendant and the Commissioners, in which the defendant, after stating that he had signed the order, set it out. It was proved that the defendant's attorney had admitted, in conversation with the plaintiff's attorney, that the paper was a true copy (except as to the jurat) of an affidavit sworn by the defendant, but not filed or used. For the defendant it was then objected, that the order was not proved to have been stamped, or assented to by *Thorpe*, or to have been examined with the original; but the Lord Chief Baron permitted the copy to be read. The deed of 15th *July* 1830 was then tendered in evidence. It had a 5*l.* stamp only; and its reception was objected to, on the grounds, that the stamp was

(*a*) By order of this Court, forming part of the above mentioned rule made under the Interpleader Act.

insufficient,

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insufficient, and that the plaintiff was no party to the deed. It was proved that, when the deed was executed, 30*l.* was due to the defendant from the Commissioners; that, since then, he had earned 367*l.*, of which 297*l.* were his earnings since his discharge under the Insolvent Debtors' Act, to the time the action was brought; that he had earned 40*l.* more since the commencement of the action, and that it was not likely that above 600*l.* more would be expended, making therefore an addition of not above 45*l.* to the commission; and making in all not above 482*l.* to be and become due, at and since the execution of the deed. A verdict was then taken for the plaintiff for 150*l.*, and leave given to move to enter a verdict for the defendant.

Boileau, in this term (*a*), moved accordingly. First, the search for the order of 22d *September* 1829 was insufficient. The papers of the Commissioners, and of their comptrollers, ought to have been searched. Secondly, the admission by the defendant's attorney does not go far enough: it should have been shewn that he had compared the two papers; and, at any rate, that the order was stamped, as it ought to have been, being a "bill of exchange," or "order for money." In stat. 55 *G.* 3. *c.* 184., Sched. Part 1. *Bill of Exchange*, the words are "Inland bill, draft, or order for the payment of any sum of money, weekly, monthly," &c. "where the total amount of the money, thereby made payable, shall be specified therein, or can be ascertained therefrom," and "Where the total amount of the money thereby made payable shall be indefinite;" and

(*a*) The motion came on twice, *Nov.* 3d, and *Nov.* 7th; before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

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it is declared that "all bills, drafts or orders for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee, or some person on his or her behalf," shall be deemed to be inland bills, &c. Thirdly, the order was simply a request addressed to *Thorpe*, and might be revoked by the defendant at any time, at all events, until the acceptance of it by *Thorpe*, or some one on the part of the Commissioners, which was not proved. Fourthly, the stamp on the deed of 15th *July* 1830 was insufficient. By stat. 55 *G.* 3. *c.* 184., Sched. Part 2., the deed, as a *conveyance*, the expressed consideration of which (the two debts) exceeded 1000*l.*, should have had a 12*l.* stamp; or, as a *mortgage*, since the sum secured exceeds 1000*l.*, a stamp of 6*l.* Fifthly, the defendant could not assign his future earnings; *Robinson* v. *Macdonnell* (*a*). Lastly, since the plaintiff is no party to this deed, he is not entitled to use it. The declaration, therefore, is not supported.

The Court took time to consult with the Lord Chief Baron, intimating that, if they should consider the points proper to be argued, a special case should be stated. In the same term (*November* 19th),

Lord DENMAN C. J. said: Several objections were taken to the verdict. It was necessary to prove that an order had been given for the payment of the money to the plaintiff, and that order was not produced.

(*a*) 5 *M.* & *S.* 228.

But,

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But, in the opinion of the Lord Chief Baron, it was shewn that a diligent and bonâ fide search had been made for it. Then it was argued, that there was no evidence that the order had been stamped. But the defendant himself had set out the order in his affidavit; and, in the absence of evidence to the contrary, we must presume it to have been duly stamped. But then it is objected that only a copy of this affidavit was produced: it was, however, admitted to be a true copy by the defendant's attorney. Then the deed was objected to, as having only a *5l.* stamp, which was said to be insufficient. But we think this deed was not a mortgage, but an absolute assignment of the commission due to the plaintiff; and, as it was proved that this did not amount to *500l.*, the stamp is sufficient. The trial took place under a rule of Court: but we should not have thought it, therefore, the less necessary to direct a new trial if improper evidence had been admitted. We do not, however, think this was the case; and there must, therefore, be no rule.

Rule refused.

The KING *against* The Archdeacon of MIDDLESEX and Another.

Monday, Nov. 9th.

THIS case is already reported, 3 *A. & E.* 615.

Monday, Nov. 9th.

In the Matter of NEWBERY, Gent., One, &c.

Money was invested in stock, pursuant to a will, for the benefit of a legatee. An attorney obtained the legatee's authority, and a power from her trustee, to sell out the stock, representing that it might be better invested in a mortgage, and that he would find a proper security. The money was sold out, and the proceeds received and held by the attorney, he paying interest on the amount to the legatee, who did not know that the money had not been re-invested. Inquiries being afterwards made, he admitted, after some evasion, that he had not re-invested the sum; but, upon being further urged, promised that he would do so, and at length proposed a mortgage (which was thought insufficient) on property of his own. No further satisfaction being offered, the legatee moved the Court against him, and a rule was made, by consent (the attorney having filed no affidavit), ordering that he should re-invest the money in stock, on or before the 24th of *June* then next, and pay costs, and, on default, that an attachment should issue against him. The money was not re-invested, nor costs paid, and on *June* 25th a fiat in bankruptcy issued against the attorney, who, in *October*, obtained his certificate. The rule and allocatur were served, and the costs demanded, in *August*. On motion made afterwards for an attachment pursuant to the above rule:

Held, that, under these circumstances, the certificate was no answer to the application, and that the attachment might issue.

G. T. WHITE, in last *Hilary* term, obtained a nisi for an attachment against *Jacob Newbery*, an attorney of this Court, for not investing certain monies pursuant to a former rule of the Court, and for not paying 21*l.* (costs) pursuant to the said former rule, and to the Master's allocatur. The affidavits on which the present rule was obtained stated the following among other facts.

James George by his will left certain estates to *William Hiscock* and *John Waugh*, his executors, in trust to sell, and to stand possessed of the produce, upon trust, as to one seventh part, to lay out the same in government stock or real securities, and to pay the dividends, interest, or yearly produce to *Sarah George*, afterwards *Sarah Spratley*, during her life. After the testator's death, the trustees invested the one seventh share in three per cent bank annuities, and paid the interest to *Sarah*, the legatee. In 1830, *Waugh* died. *Hiscock*, the surviving trustee, (now dead,) was in embarrassed circumstances, and was not competent to the management of his own affairs, being impaired in his intellects. *Newbery*, who had been the testator's

solicitor,

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solicitor, and had been employed in the business of the executorship, and was *Hiscock*'s private solicitor, remained, after *Waugh*'s death, the sole active manager of the trust fund; and he informed Mrs. *Spratley* that more interest could be made of the trust money if laid out on mortgage: she therefore, under his advice, and on his assurance that he would immediately provide a proper security for the money, signed the following authority, dated *August* 24th, 1831:—"Mr. *Hiscock*. As I am informed that the trust money to which I am entitled for my life under the will of the late Mr. *James George*, of which you are the surviving executor, may be laid out at 5 per cent. upon mortgage of freehold security, I shall be obliged by your investing it in that way, instead of its remaining in the 3 per cent. reduced stock." *Newbery* soon afterwards obtained from *Hiscock* a power of attorney, not to the bankers who had been employed to purchase the stock and receive the dividends, but to *Newbery* and his agent, to sell out the stock. It was accordingly sold, (*December* 1831,) and produced 555*l.*; and Mrs. *Spratley*, who deposed to these facts, stated that, as she was informed and believed, the amount was remitted to him, and applied by him to his own use. *Newbery* paid her 5 per cent. interest on the sum which should have been invested, and she, consequently, supposed that the investment had been made. In *November* 1832, being led by circumstances to suspect *Newbery*, she made particular inquiries of him as to the investment of the principal, and, the answers being unsatisfactory, she authorised *Bellringer* and *Frankum*, her relations, to insist, on her behalf, that the money should be re-invested in stock. They made several

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applications to him in 1833, but received evasive replies, and were at length told by him that the money remained in his hands uninvested. He then promised to re-invest it, but failed to do so; and in *January* 1834, being further pressed, he offered a mortgage of property of his own as a security, which, being considered inadequate, was rejected. Afterwards (*February* 3d, 1834,) *Newbery* made a further promise to re-invest in a month, but omitted doing so, and, about the end of the month, his clerk again proposed the mortgage, stating that, if it were not accepted, the claimants would get nothing. In *Easter* term 1834, a rule was moved for and made absolute (*May* 6th), *Newbery* filing no affidavit, whereby it was ordered (upon hearing counsel on each side, and by consent) that *Newbery* should re-invest in the names of *Bellringer* and *Frankum*, on or before the 24th of *June* then next, 658*l*., 3 per cent. stock, "which on the 27th day of *December* 1831, was sold out and received at the Bank of *England* by virtue of a power of attorney executed by one *William Hiscock* the surviving trustee appointed by the will of *James George* deceased, and since applied by the said *Jacob Newbery* to his own use:" and it was referred to the Master to tax the costs of that application, to be paid, when taxed, by *Newbery* to *Sarah Spratley*. And it was further ordered that, in default of the money being invested and costs paid within the time aforesaid, an attachment should issue against *Newbery* for his contempt. The rule, with the Master's allocatur, was served on *Newbery* on the 8th of *August* 1834, and payment of the costs demanded, but they were not paid. At the same time, *Newbery*, on being asked, said that he had not re-invested the money.

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On the 25th of *June* 1834, a fiat in bankruptcy issued against *Newbery*; and in the *October* following he obtained his certificate. *Bellringer* and *Frankum* deposed to their belief that he had become bankrupt with a view to deprive Mrs. *Spratley* of her money.

An affidavit by *Newbery* was filed in opposition to the present rule, for the purpose of shewing, among other things, that the mortgage offered by him would have been a sufficient security; it also stated that, when he consented to the former rule, he had reason to suppose that his circumstances would enable him to make the re-investment, but that he afterwards became embarrassed, in consequence of which a fiat in bankruptcy issued against him on the 25th of *June*. The affidavit contained other statements contradicting or explaining those made in support of the rule.

Platt now shewed cause. Before the 8th of *August*, when *Newbery* was called upon to comply with the rule of *Easter* term 1834, he had become bankrupt, and compliance was out of his power. An attachment is granted to enforce the more speedy performance of something which a party is in law compellable otherwise to do. But here, the costs, and the 658*l.* to be re-invested, were a debt proveable under the commission (*a*); an action for the 658*l.*, or for the costs (if they had been so recoverable), would have been barred by the certificate; and consequently no attachment lies.

G. T. White contrà. The Court clearly meant to intimate, by the rule of *Easter* term, that *Newbery* had fraudulently procured the stock to be sold out. That rule was made absolute without any affidavit being filed in oppo-

(*a*) See *Riley* v. *Byrne*, 2 *B.* & *Ad.* 779.

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sition. *Newbery* was in contempt when he omitted to comply with the rule on the day appointed. [*Coleridge* J. Where a party has become bankrupt, it appears from *Baron* v. *Martell* (*a*) that, in order to obtain an attachment, it must be shewn that he was in contempt before the certificate. Lord *Denman* C. J. Is there any authority for an attachment issuing, where the demand was made at a time when the party could not comply?] A time was fixed, here, the 24th of *June*; and immediately afterwards *Newbery* became bankrupt. [Lord *Denman* C. J. The rule is, that there shall not be an attachment without a demand and refusal. Here the demand was after the party had become bankrupt.] In the case *In the matter of Bonner* (*b*), where an attorney who had been bankrupt was called upon to repay money, and fraud was imputed to him, Lord *Tenterden* said, "Let the attorney dare to tell the Court that, having obtained this money in his professional character, he will not pay it over because he is protected by his certificate, and I shall know how to deal with him." [Lord *Denman* C. J. Then you impute to the attorney here, that, when the demand was made, he had by his own act put it out of his power to pay. *Coleridge* J. Does it appear, in the case *In the matter of Bonner* (*b*), how long the attorney had obtained his certificate? He may have been able to pay when Lord *Tenterden* used the language.] This is a case in which an action of tort would have lain, but that a technical difficulty might have arisen as to the party to be made plaintiff on the record: and to such an action the certificate would have been no answer. *Parker* v. *Crole* (*c*) shews that such a defence

(*a*) 9 *D.* & *R.* 390.

(*b*) Cited in the case of the same name, 4 *B.* & *Ad.* 813.

(*c*) 5 *Bing.* 63.

is

is not available in an action for selling out stock contrary to orders, and fraudulently. [Lord *Denman* C. J. The present rule does not call upon the party to answer a case of fraud, nor does it appear that he was so called upon by the former rule.] The rule of *May* 6th shews that he then stood charged with selling out stock under a power of attorney from *Hiscock*, and applying it to his own use; and from this, and the order that he should re-invest or an attachment peremptorily issue, it is evident that a case of fraud was then before the Court. At least the Court will now refer it to the Master to ascertain whether deception was not practised in obtaining the authority to sell out.

Lord DENMAN C. J. I am unwilling to exercise the summary jurisdiction of the Court in a case of this kind, unless I see clearly that the circumstances warrant us in so doing. But my brothers think this a case in which the jurisdiction may be exercised, and I am of the same opinion. The process of attachment was inchoate before the bankruptcy, and the bankruptcy took place under circumstances of so much suspicion, that I think we are authorised in saying that it was incurred for the purpose of avoiding compliance with the order of Court. We may then give effect to our own rule, which was in progress before the bankruptcy took place, and order this attachment to issue. I also think that there is distinct proof of fraud.

PATTESON J. I am of opinion that this rule must be absolute. The stock in question was sold out, a long time ago, I think not fraudulently. It does not appear that *Newbery* actually led any one to suppose that he had

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had invested the proceeds. When it was ascertained that they had not been invested, he was called upon to make the investment, and it then appeared that he had applied the money to his own use, and had it not to lay out. Upon this the rule of *May* 6th was made, calling upon him to invest the money on or before the 24th of *June*, on pain of an attachment; and when the matter became pressing, on the very day after the 24th of *June*, the fiat in bankruptcy issued. One cannot but see that this was done to get rid of the necessity of complying with the rule of Court.

WILLIAMS J. I think this rule must be absolute. It does not appear that by the 24th of *June Newbery* had done any thing towards complying with the rule of Court, and it seems clear that he had no intention of doing so. I think a ground of fraud is clearly laid.

COLERIDGE J. The facts of this case raise an almost irresistible presumption of fraud. The money was put into *Newbery's* hands, not that he might hold, but that he might lay it out on mortgage. He held it for a long time, not having, as it appears, any means of becoming himself a mortgagor, and paying five per cent. interest. That is a circumstance in the case against him. Why should he have made those payments of interest? Being urged to re-invest the money, he gives promises which are not fulfilled, and an application is at last made against him to this Court. He files no affidavit, and consents to the rule being made absolute on payment of costs. That is another circumstance weighing against him. By that consent he gains the opportunity of fixing a particular day for the reinvestment; he does not then re-

invest,

invest, and on the day following a fiat in bankruptcy issues; a fact which is unexplained. Without saying how it would be if fraud had not been proved, I am of opinion that in this case the rule for an attachment must be absolute.

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Rule absolute.

HALL *against* MIDDLETON.

Monday, Nov. 9th.

ASSUMPSIT for money lent, and on an account stated. Pleas, to the first count, payment; to the second, non-assumpsit, on which issue was joined. Replication to the first plea, that plaintiff sued, not for the non-performance of the promises in the first plea mentioned, and in full satisfaction and discharge whereof defendant paid plaintiff the sum in that plea mentioned, but for the non-performance of another and different promise made by defendant to plaintiff, in manner and form as in the first count mentioned. Verification. Rejoinder, non assumpsit: and issue thereon. The cause was tried at *Chesterfield*, on the 1st of *December* 1834, before the under-sheriff of *Derbyshire*, on whose notes, produced as after mentioned, the following facts appeared. The plaintiff claimed 15*l.* for money lent in *August* 1833. A witness proved for the plaintiff that, in *October* 1833, the defendant acknowledged owing the plaintiff 15*l.* for money borrowed; and that, in *February* 1834, on being asked why he had not paid the plaintiff the 15*l.* he owed him, the defendant answered that he had paid

In assumpsit for money lent, payment was pleaded; the plaintiff new assigned, and non assumpsit was rejoined. The plaintiff, at the trial, claimed 15*l.* for money lent in *August* 1833, and proved an acknowledgment by the defendant after that time, that he owed the plaintiff 15*l.* The defendant gave evidence of his having paid the plaintiff 15*l.* in *October* 1833. The under-sheriff, in summing up, stated the question for the jury to be, whether or not the 15*l.* said to have been lent in *August* 1833, had been so lent. The plaintiff had a verdict. On motion for a new trial, or to enter a verdict for the defendant:

Held, that the proper question for the jury was, whether or not there had been two debts; that the defendant was not precluded from taking this point by the evidence of payment which he had produced at the trial; and that, there having been some evidence of a second debt, a new trial must be had.

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it when his uncle's affairs were settled. Another witness proved that, on the occasion alluded to, no such settlement took place. For the defendant, a witness stated that, in the latter end of *October* 1833, the plaintiff called on the defendant, and asked him for 15*l.*, which the defendant paid, with 4*s.* 6*d.* for the loan, and the plaintiff said, "it would make it right of all accounts." The plaintiff had a verdict for 15*l.* and interest. The defendant's solicitor, after the verdict had been given, requested the under-sheriff to put to the jury whether there were two sums of 15*l.* lent, or whether there was any other sum lent than that mentioned in the first count of the declaration; but the under-sheriff refused. *Maule*, in *Hilary* term, 1835, obtained a rule, on production of the under-sheriff's notes, and on affidavits (*a*),

(*a*) *Maule*, in the first instance, moved (*January* 13th) without producing the under-sheriff's notes, or an affidavit accounting for the non-production. It being objected that this was contrary to the rule laid down by the Court (see *Mansfield* v. *Brearey*, 1 *A.* & *E.* 347.; *Burney* v. *Mawson*, 1 *A.* & *E.* 348. note (*a*);) he urged that the rule was recent, and probably not known to the parties now applying, that the statute 3 & 4 *W.* 4. *c.* 42. gave no direction on this subject, and that a considerable delay must take place before the notes could be procured. The Court said that they would confer with the other Judges as to the practice. On the following day, Lord *Denman* C. J. stated that the Court of Exchequer had acted upon the rule laid down in the above-mentioned cases, and that this Court would adhere to it for the future. Time was however given to *Maule*, in the present instance, to procure a copy of the notes, and, in the same term (*January* 20th), he produced it, with an affidavit by the clerk of the defendant's attorney, stating that the copy (annexed to the affidavit) had been delivered to the deponent by the under-sheriff, who said at the time that it was a true copy, and contained the whole of the notes taken by him at the trial. A rule nisi was then granted. On shewing cause it was contended that, although this rule had been granted, the defendant could not avail himself of it, having come to the Court too late, through want of diligence in procuring the notes; that the rule of practice laid down by the Court was well known before *Hilary* term 1835; and that there had been laches even after time was given to obtain the notes. The objection, however, was not noticed by the Court.

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to shew cause why there should not be a new trial, or a verdict entered for the defendant, on the ground that the under-sheriff had improperly refused to put the above question, which was stated, on affidavit, to have been suggested immediately on the close of the summing up; and likewise (which also appeared by affidavit only) that the under-sheriff had merely put it to the jury, whether the 15*l.*, said to have been lent to the defendant by the plaintiff in *August* 1833, had been so lent.

W. H. Watson now shewed cause. The Court will give credit to the under-sheriff's notes, as to the facts stated in them, rather than to the affidavits. It is true that, where there is a new assignment, the plaintiff must shew that there was a second trespass, or, in a case like the present, a second debt. Here the plaintiff proved *a* debt. It did not appear in evidence that there was any other. But the defendant, instead of taking this objection when the plaintiff had closed his case, called witnesses for the purpose of establishing a payment applicable to the debt which had been proved. Failing to do so, he changes his course, and contends that the question which ought to have gone to the jury was, whether or not two debts had existed. But, after having virtually admitted that there were two debts, and rested his defence upon a payment of the debt newly assigned, he cannot come to the Court, alleging that he took a wrong point at the trial, and claiming their interference to set him right. In *Pratt* v. *Groome* (*a*) it appeared, affirmatively, by the plaintiff's case, that only one place was in question; and, in the same manner, in *Oakley* v. *Davis* (*b*), that there was only one

(*a*) 15 *East*, 235. (*b*) 16 *East*, 82.

arrest

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arrest really complained of. [*Patteson* J. The defendant here was not at liberty to prove payment of the debt newly assigned, not having rejoined payment of it. The evidence of payment must have been given to identify the debt spoken of by the plaintiff's witnesses, with that of which payment had been pleaded.]

Maule contrà. The question raised on the record was, whether there were two debts or only one; and that ought to have gone to the jury. The evidence of payment was given to identify the debt paid with that first pleaded to. (He was then stopped by the Court.)

Lord DENMAN C. J. We agree in the view taken on the defendant's part. The only issue was, whether or not there was a second debt. Any question as to payment of that debt was immaterial.

PATTESON J. The rule must be absolute for a new trial, as there was some evidence of a second debt. If there had been no such evidence at all, the defendant would have been entitled to have a nonsuit entered.

WILLIAMS and COLERIDGE Js. concurred.

W. H. Watson prayed the Court to make an order, to enable the plaintiff, under *Reg. Gen. Hil.* 2 *W.* 4. 1. 64. (*a*), to recover his costs if he succeeded on the second trial; contending that this ought to be done, where the Court saw that it was consistent with equity.

Per Curiam. We do not see that in the present case.

Rule absolute for a new trial.

(*a*) 3 *B.* & *Ad.* 383.

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The KING *against* The Justices of CAMBRIDGESHIRE.

Tuesday, Nov. 10th.

In an order of justices for stopping up a highway as unnecessary, under stat. 55 G. 3. c. 68. s. 2., the following recital; — We, *A.*, *B.*, and *C.*, justices" &c., "assembled at a special sessions held" &c., on &c., "having upon view found" that a certain part of a highway called &c. is unnecessary:— sufficiently shews that the justices viewed such highway together, and at the time when the order was made.

Such order, if not made on a joint view, would be bad.

A direction in such order, that the land of the discontinued highway be sold by the surveyors to *H. J. A.*, whose lands adjoin thereto, if he shall be willing to purchase the same, if not, to some other person or persons, for the full value thereof; is sufficient under stats. 55 G. 3. c. 68. s. 2. and 13 G. 3. c. 78. s. 17., though the form of an order given in the schedule (No. xviii.) to the latter act introduces the words "for the full value thereof," after the words "purchase the same," as well as in the subsequent part of the sentence.

It is not necessary to the validity of such an order, that a certificate of sale should be subjoined to it, pursuant to stat. 13 G. 3. c. 78. Sched. No. xix.; or that any direction should be given in the order, as to the application of the purchase-money.

A public highway led over the land of *H. J. A.* He opened another road over his own land, between the same points, which the public used, and they ceased using the former road. Nine years afterwards, he obtained an order of justices for stopping up the old road as unnecessary, under stat. 55 G. 3. c. 68. s. 2. Held, by Lord *Denman* C. J. and *Patteson* J., that such order might properly be made, and that it was not necessary to proceed as in case of diverting a highway under 13 G. 3. c. 78. s. 16.

Also, by Lord *Denman* C. J., *Patteson* and *Williams* Js., that the justices might properly state in their order that they had viewed the old road, if they had viewed the ground over which the right of way was, although the road itself had gone into disuse.

Also, by Lord *Denman* C. J. and *Patteson* J., that an order directing the surveyors to sell the soil of the old highway to *H. J. A.*, whose lands adjoin, if he will purchase, if not, to some other person, for the full value, is not bad, although *H. J. A.* be himself the surveyor; at least if no fraud appear.

The general rule is, that the Court will not, on application for a certiorari, notice objections raised by affidavit; at least where they might have been brought before the sessions on appeal. As to exceptions, quære.

IN *Hilary* term last a rule was obtained calling upon the justices of *Cambridgeshire* to shew cause why a certiorari should not issue to remove into this Court an order made by them at their quarter sessions in the preceding *October*, confirming an order of justices in special sessions. The latter order was as follows: —

"*Cambridge* to wit. We *Francis Dayrell*, Esq. and the Rev. *John Addison Carr* and *George Pearson*, clerks, three of his Majesty's justices of the peace for the said county of *Cambridge* acting in and for the division of *Linton* in the said county, assembled at a special sessions held at the *Crown Inn* at *Linton* in the said county

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on *Thursday* the 11th day of *September* 1834, having upon view found that a certain part of a common and ancient king's highway called the *Walden* way, leading from the township of *Fulbourne* in the said county," &c. (then followed a description of the road, which was mentioned as situate in the parish of *Babraham*, and as passing, in one part, "through a plantation in the occupation of *Henry John Adeane*, Esq.") "is useless and unnecessary, do hereby order the same to be stopped up and discontinued, and the land and soil thereof to be sold by the surveyors of the highways of the said parish of *Babraham*, to the said *Henry John Adeane* whose lands adjoin thereto, if he shall be willing to purchase the same, if not, to some other person or persons, for the full value thereof. Given under our hands and seals, the day and year and at the place first above written."

(Signed and sealed by the three justices.)

The order of the quarter sessions (holden 17th *October* 1834) recited the order of special sessions, and stated that an appeal was entered against it by *Thomas Mortlock*, Esquire, which appeal was heard at the said quarter sessions, and that the justices there confirmed the order, and directed it to be enrolled.

In support of the rule for a certiorari, the following objections were insisted upon: — First, as to the form of the order of sessions. That the recited order was bad. 1. Because it did not shew that the justices who signed that order acted upon their own view, or, if they did, that the several justices took the view at one time; or at what time it was taken. 2. Because it directed the land of the discontinued highway to be sold to *H. J. Adeane*, not saying "for the full value." 3. Because no

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no certificate of the sale of such land was written under the order. Secondly, upon the merits, the following objections to the recited order were raised by affidavit. 1. That the old highway was "diverted, turned, and stopped up," in 1825, by Mr. *Adeane* of his own authority, and without any application to justices; that Mr. *Adeane* at that time made a way for the use of the public, in lieu of the old *Walden* way, over land then in his occupation, or that of his tenants, without any order of justices to sanction the diverting, turning and stopping up the old way, or making the new; and that the old road could not nor would have been adjudged unnecessary, but for the existence of the new. And it was suggested, on this part of the case, that the proceedings taken as to these roads were an attempt irregularly to divert the old highway, under the pretext of stopping it. 2. That Mr. *Adeane*, to whom the surveyors of highways of the parish of *Babraham* were directed to sell the soil of the old road, if he should be willing to purchase, was himself, when the order of special sessions was made, and from thence hitherto, one of the surveyors of *Babraham*.

It was also stated, on affidavit, that the road which Mr. *Adeane* had made, as a substitute for that which was stopped, lay over land in which he had not an exclusive interest, and, consequently, that he could not give a legal right of way by this road: that the order of special sessions was not legally signed by more than two of six justices who were present: and that Mr. *Adeane* was chairman of the quarter sessions at which the confirmatory order was made (*a*). But these objections were answered by affidavits of Mr. *Adeane* and

(*a*) It was stated in answer, that he did not act on this occasion.

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others; and, with respect to the stopping up of the *Walden* way, Mr. *Adeane* deposed that that was not done till six months had elapsed from the making of the new road, during which time, as he was informed and believed, no person used the *Walden* way.

Sir *W. W. Follett*, *B. Andrews*, and *Byles*, now shewed cause. The statute 55 *G.* 3. *c.* 68. *s.* 2. gives justices the power of stopping up unnecessary highways, "by such ways and means, and subject to such exceptions and conditions in all respects as in the said recited act" (13 *G.* 3. *c.* 78) "is mentioned, in regard to highways to be widened and diverted," only with a variation as to the disposal of the money to be raised by selling the land. Then, as to the first objection. The section of 13 *G.* 3. *c.* 78., which directs the view to be taken by justices before ordering a highway to be diverted, is *s.* 16.; the words of which are, "that where it shall appear, upon the view of any two or more of the said justices," &c., "such justices shall, and they are hereby empowered," &c.: and the schedule, No. xvi, to this act, which relates to the subject matter of that clause, begins, "We, ——, two of his Majesty's justices of the peace," &c., "*having, upon view, found* that a certain part of the highway," &c.: the words used in the present order. In *Rex* v. *The Justices of Worcestershire* (*a*) an order, under 55 *G.* 3. *c.* 68., beginning "We, the undersigned," &c., "having upon view found, *or* it having appeared to us," &c., was held bad: probably the objection now made has arisen from a misconception of that case. [Lord *Denman* C. J. We need not trouble you

(*a*) 8 *B.* & *C.* 254.

farther

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farther on this point. *Patteson* J. An order, irregularly made, under stat. 13 *G.* *c.* 78., was not removeable by certiorari; *Rex* v. *Casson* (*a*). It seems the certiorari is not taken away by the present act]. That may be a question: but orders have been brought up by certiorari under this act (*b*). As to the second objection, stat. 13 *G.* 3. *c.* 78. *s.* 17. directs that the soil of the old highway, when stopped, shall be sold "to some person or persons whose lands adjoin thereto, if he, she, or they, shall be willing to purchase the same, if not, to some other person or persons, for the full value thereof:" and the present order follows the words of this clause. It is true that the form in the schedule, No. xviii, introduces the words "for the full value thereof," after the words "purchase the same," as well as in the subsequent part of the sentence; but there is no substantial difference in the order, as here drawn; the words "for the full value," though inserted at the end, override the whole sentence: and, by sect. 70., although the forms of proceedings are to be those set forth in the schedule, yet no objection is to be made for want of form. Sect. 80. provides, generally, that "no proceedings to be had or taken in pursuance of this act shall be quashed or vacated for want of form:" that provision must extend to an order like the present, made under the subsequent act. Thirdly, the certificate of sale, under 13 *G.* 3. *c.* 78. *s.* 17., relates to a period after the sale, and is not necessary to the order for stopping up. As to the objection that this is an attempt to divert a road; the proceeding is strictly a stopping up, pursuant to stat. 55 *G.* 3. *c.* 68. *s.* 2. This, and the other ob-

(*a*) 3 *D.* & *R.* 96. (*b*) *Rex* v. *Horner*, 2 *B.* & *Ad.* 150.

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jections not arising on the face of the order of sessions, are answered by the affidavits in opposition to the rule. [*Coleridge* J. They were objections to be taken on the appeal].

Sir *F. Pollock*, *Kelly*, and *Starkie*, contrà. By stat. 13 *G.* 3. *c.* 78. *s.* 70., the forms given in the schedule are to be used on all occasions in proceedings under that act; and *Davison* v. *Gill* (*a*) shews that this enactment is peremptory, not merely directory. And, even if it were not necessary in a proceeding under 55 *G.* 3. *c.* 68. to pursue the forms in the old schedule, the order should then adhere to the words of the act under which it is made; here the order does not strictly follow either the schedule or the enacting clauses. If the order was to be framed on any form in the old schedule, No. xviii should have been followed: here No. xvi has been chiefly pursued. As to the first objection; the order does not shew how long before it was made the view took place, nor even that the justices viewed at all. Secondly, it is matter of substance that the words, "for the full value thereof," should be repeated, as in the schedule. The repetition there must be supposed to have a meaning, and to be intended for greater caution. The order, as to selling, is an instruction to the surveyor; he is no party to it, nor is it to be supposed that he refers to the act under which it is framed: he is merely to act upon the directions given him, and therefore they ought to be precise. Thirdly, the certificate of sale directed by the schedule No. xix, "to be wrote under the order,"

(*a*) 1 *East*, 64.

is

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is essential to it. By stats. 13 *G.* 3. *c.* 78, and *55 G.* 3. *c.* 68, where a road is stopped up, a sale of the land is necessary to render the proceeding valid. The sale must be with the approbation of the justices, and a proper application of the proceeds directed, according to 13 *G.* 3. *c.* 78. *s.* 17. or stat. *55 G.* 3. *c.* 68. *s.* 2. The certificate of sale (schedule, No. xix, to 13 *G.* 3. *c.* 78.) would shew that these requisites had been fulfilled: here it does not appear that the land has been sold with the approbation of the justices, or the proceeds duly appropriated, or even that the land has been sold at all. The statutes clearly intend that the order and certificate should appear together. But further; supposing even that the order of special sessions were correct in point of form, the affidavits shew that it was irregularly made. [Lord *Denman* C. J. Might not the matter of these affidavits have been brought before the quarter sessions on the appeal?] If it shews want of jurisdiction, it may be taken into consideration by this Court. This is not in reality a proceeding to stop up an unnecessary highway, according to stat, *55 G.* 3. *c.* 68. *s.* 2., but to divert a road, the old way being stopped and a new one substituted; and, unless the conditions prescribed for that proceeding by stat. 13 *G.* 3. *c.* 78. were observed, the justices, in stopping the old road, acted without jurisdiction. That road, if it became useless, was so, not per se, but by the substitution of another. Then the justices, before they made an order for stopping, should have satisfied themselves that a new road was made, and properly secured to the public; and, upon the sale of the old road, they should have given their approbation to a disposal of the proceeds according to the direction of stat. 13 *G.* 3. *c.* 78. *s.* 17., which

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is different from that of stat. 55 G. 3. c. 68. s. 2. The order for stopping, under either statute, is to be made upon the view of the justices: but here the order was made in 1834; the old road had then been disused ever since 1825, and no longer existed in a condition in which it could be viewed. [*Coleridge* J. You treat this as a diversion, but the order does not purport to give a new road.] If the intention is to substitute one, it would be highly unjust that the magistrates should be enabled to defeat objections by not mentioning the new road in their order. If they had mentioned it, and had not shewn that the public would acquire a permanent right of way in it, the order would have been bad for want of jurisdiction, *Rex* v. *Winter* (*a*). *Welch* v. *Nash* (*b*) shews that they cannot give themselves jurisdiction by omitting to notice the substitution of a new road, where that is really contemplated. In that case the justices stated that they had ordered the old highway to be diverted, and were satisfied that the new highway, described in a plan referred to, had been properly made; and they then ordered the old highway to be stopped. The orders were confirmed by the sessions, on appeal. Yet the defendant in an action of trespass was allowed to offer evidence that in fact no new road had been made. [*Coleridge* J. That was in an action. Can we try such a question on affidavits?] Objections to jurisdiction have often been so tried: *Rex* v. *Great Marlow* (*c*), *Rex* v. *Standard Hill* (*d*). There is no reason that a party should be permitted by his own unauthorised act, and by lapse of time, to divert a road without having recourse to an

(*a*) 8 *B.* & *C.* 785.
(*b*) 8 *East*, 394.
(*c*) 2 *East*, 244.
(*d*) 4 *M.* & *S.* 378.

order

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order of justices for the express purpose; and great inconvenience would result from such a practice. The remaining objection is, that Mr. *Adeane* is himself the surveyor. An order that a surveyor shall sell to himself is like an order that a man shall adjudge in his own cause, and is against the rule of equity, that a trustee shall not be a purchaser.

Lord DENMAN C. J. The first objection would be well founded, if the order of special sessions bore the construction which has been put upon it. I wish it to be distinctly understood that, to ground an order of this kind, the view by justices is not sufficient, unless it be a joint view, nor unless their finding be come to immediately upon it. The justices are to make the order on consulting together, and they cannot proceed upon a separate view. But here it does not appear, from the words of the order, that the view has been improperly taken; for the schedule, No. xvi, to 13 *G.* 3. *c.* 78., is in the same language: the legislature therefore has shewn that the terms used in the present order sufficiently express its meaning in the clause referred by stat. 55 *G.* 3. *c.* 68. *s.* 2., upon which the order is framed. The second objection, that the words "for the full value thereof" are not twice repeated, appears to me of no weight; because I think that these words, occurring at the end of the sentence, override the whole, as they do in the corresponding clause, stat. 13 *G.* 3. *c.* 78. *s.* 17. As to the third objection, that no certificate of sale is written under the order; upon reference to stat. 55 *G.* 3. *c.* 68., it appears that the part of stat. 13 *G.* 3. *c.* 78., which rendered that form necessary, is repealed by the later

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act (*a*). Then, as to the questions raised by affidavit. It is contended that evidence may be now offered to the Court, for the purpose of shewing want of jurisdiction to make an order; and with that view circumstances are adduced, which, it is said, prevented the justices from viewing the old road in the state in which it was when the stoppage was first made. But I do not think that a just mode of presenting the case. The only question with reference to such an order is, whether the road, as it exists at the particular time when the view is taken, be necessary or not. By whatever circumstances it may be rendered unnecessary, the justices are only to say whether in fact it be so or otherwise. It is wisest to pursue the words of the act strictly. But, independently of this, I think if the fact be that a party has stopped the old road, giving a new in its stead, which has been adopted and not complained of, and he then applies to the justices to grant an order for the stopping, there is nothing to prevent them from finding that the old road is unnecessary. It is said that, at the time of this order, the old highway was no longer in a condition to be viewed as a road: and it is true that, in the enactments relating to the view by justices, the word "highway" is used. That, however, is equivocal; the word may mean a way capable of being travelled, or a place, merely, over which there is a right of way: and here I think the last only is meant. Then it is said that the order directs a surveyor to sell to himself. It would be better that the surveyor should not be a purchaser in his own year; but there is nothing to prevent such an officer, when he is a proprietor of adjoining land,

(*a*) Sects. 1, 2. Compare stat. 13 *G. 3. c.* 78. *s.* 17.

from

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from buying the soil of the old highway. I do not say that, even on certiorari, the Court would not set aside an order if manifest fraud were shewn. That may be so. In *Rex* v. *The Justices of Somersetshire* (*a*), where a certiorari was applied for to remove an appointment of overseers, on a suggestion of corrupt motives in the appointing magistrates, the Court refused a rule, saying that the parties complaining might appeal to the sessions or move for a criminal information. Notwithstanding that refusal, however, I do not say that if corruption were clearly made out the Court would not, upon an application like this, declare the order invalidated by the fraud. But here there is not the slightest foundation for any imputation on Mr. *Adeane* as a magistrate or a gentleman, nor any fact shewn to vitiate the proceedings. The rule must therefore be discharged.

PATTESON J. The schedule to stat. *55 G. 3. c.* 68. does not give any form of an order for stopping up an unnecessary highway; but the act, sect. 2., says that it shall be done "by such ways and means, and subject to such exceptions and conditions in all respects," as is mentioned in 13 *G. 3. c.* 78., "in regard to highways to be widened and diverted:" and this order of justices appears to be drawn from the forms xvi. and xviii. in the schedule to the statute of 13 *G.* 3., taking from each what seemed fit for the purpose. As to the words "having upon view found;" upon reference to sect. 16 of stat. 13 *G. 3. c.* 78., and sect. 2, of stat. *55 G. 3. c.* 68., in both of which the words are "upon the view of any two or

(*a*) 1 *D. & R.* 443.

more

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more of the said justices," I do not doubt that a view by two together is intended, and that if they view separately they act indiscreetly, and their order should be set aside. But, in the form here used (his Lordship here read the beginning of the order), the words "We ———, having upon view found," evidently mean "having upon our joint view found." We are bound to think that they intended so, and the words they have used import it. Then it is said that the words "for the full value," ought to have been introduced twice; as in the schedule, No. xviii, to stat. 13 *G.* 3. *c.* 78., where it is supposed that they are repeated for greater caution. That may be, but I do not believe it to be the case; for, if it were so, they should have been repeated also in the body of the act. If more is meant by the form in the schedule, where the words occur twice, than in the seventeenth section of the act, the schedule contains something which is not enacted in the body of the statute. Section 69 directs that the precedents in the schedule shall be used on all occasions, but it also cures want of form. It is also said that the order does not shew how the money, arising from the sale of the old road, is to be applied; but that is not shewn by No. xvi. or xviii. of the schedule to stat. 13 *G.* 3. *c.* 78.; only the form, No. xviii, has a certificate of sale added to it; which, however, is not required under the later act. With regard to the objections in point of jurisdiction, raised by affidavit, I protest against its being understood that we can, on every occasion, look into extrinsic matter, on motion to bring up orders by certiorari. There may be such an occasion; but the general rule is otherwise. Here, at all events, there has been an appeal to the sessions, and the points should have been raised there. But, even if

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we could look at extrinsic matter, no valid objection is raised. It is said that the old road was disused ten years ago; and that when the justices went to it, previously to making their order, there was no road for them to view. It is true that there may not have been a road to be seen, in length and breadth, as when the public were using it: but they could judge whether a road was necessary in that direction. The public had still a right to go over it; and it existed as a road in point of law. And the justices, in their order, say that they have viewed it. It is contended that this was not a stopping but a diverting; and it is true that, if they had gone to the road for the purpose of diverting it, they ought to have set out, in their order, the particulars applicable to such a case. But I see no objection to a man's setting out a new way over his own land, where there is an old one already, allowing the public to use the new or the old, at their pleasure; and, after a time, applying to the magistrates to stop the old road, as unnecessary: though magistrates should be cautious in complying with such an application, because they ought, before doing so, to be sure that the public have a new right of way given to them. If, however, any thing wrong is done in this respect, the remedy is by appeal to the sessions. The objection, that Mr. *Adeane* was surveyor, raises no question upon the form of the order, or upon the authority to make it; it relates only to the honesty of the proceeding before the justices, and that was matter for inquiry at the quarter sessions. We cannot enter into the question, whether the justices were right or wrong in making the order; but I must say that there appears to me to be no ground for any imputation.

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WILLIAMS J. It is a most important point, how far an order of justices may be questioned in this Court on account of matter dehors. I do not say that it might not be so if a case were strongly made out, shewing that the magistrates had no jurisdiction at all; but that state of things does not arise here. With respect to the opportunity which the justices had of viewing in this case, I think, referring to the language of the statutes, that the justices, when they saw the place where the old road had been, had enough to found their jurisdiction upon. And, as to this and other objections which have been made respecting the jurisdiction, it is satisfactory to find that, if there has been a defect of jurisdiction, a party who is affected may still open the question, in an action of trespass, according to *Welch* v. *Nash* (*a*). As to the statement of the view, in the order of justices; reading that document as one would read any other composition, and adopting no violent construction, I should say that, when three justices begin their order with the words "We" &c. (naming themselves), and proceed to say that they have "upon view found," &c., the view must, in all fair acceptation, be taken to be that of the justices mentioned nominatim immediately before. So the words "for the full value," if read with fair attention to the context, and not with a set purpose to overturn the meaning, must be understood as referring to the whole matter that precedes. The point as to Mr. *Adeane* being surveyor does not arise before us at all on this order.

COLERIDGE J. The most important class of objections raised here, consists of those which do not appear on

(*a*) 8 *East*, 394.

the

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the face of the order. I have always understood the rule to be clear that, on an application of this kind, objections raised merely by affidavit are not admissible. I do not say that there is no case in which, on application for a certiorari, the Court may enquire into the facts on affidavit: in some instances the Court here is a court of appeal from inferior jurisdictions; and, where it does look into the merits of proceedings below, it can do so only on affidavit. But we must be cautious not to exceed our jurisdiction: and when we find that there is a court of appeal below, to which the matter brought before us on affidavit might have been carried, I think we are confined to objections appearing on the face of the order. Here the objections raised may be of three kinds. First, that the order is on the face of it defective. Secondly, that it is made inconveniently and unjustly. Thirdly, that it is made without jurisdiction. In the second case the answer is, that there might have been an appeal to the sessions; and the stronger the argument of inconvenience, the more reason there is that the case should have been carried there. In the third case the order is a nullity, and may be contested in an action of trespass. In the first case the order may be brought before us, but there is no ground for the admission of affidavits. Then as to the objections of this class. I was at first struck with the suggestion that, if the schedule of stat. 13 *G.* 3. *c.* 78. was resorted to, the form, No. xviii, should have been pursued, and not No. xvi. But that could not be; for the form, No. xviii. relates to the stopping of an old highway under the statute of 13 *G.* 3., which is repealed, as to this proceeding, by 55 *G.* 3. *c.* 68. *s.* 2., and that section limits the justices, in the stopping of roads under the

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the new act, to the ways and means pointed out by the former one, in regard to highways "to be widened and diverted." As to the words "We ——, having upon view found;" can any lawyer have a doubt of their meaning? The view mentioned clearly means a view taken by them together, at the time of making the order, and a view of some fact which they were competent to judge of. With respect to the words "for the full value," the answer has already been given; the words occur in stat. 13 *G.* 3. *c.* 78. *s.* 17., as in this order; and if they override the preceding parts of the sentence in the one case, they do in the other. It has also been said, that by this order no direction appears to have been given as to the disposal of the money to arise from the sale; but that is unnecessary under stat. 55 *G.* 3. *c.* 68., which provides specifically that the proceeds shall be paid to the surveyor, in aid of the general highway fund. A certificate of sale is not necessary to the validity of the order: indeed an order for stopping and selling could not be concurrent with the sale; and therefore a certificate of sale could not possibly be subjoined at the time of making the order. The objection, that the surveyor, who is the party to sell, is also the purchaser, does not arise on the face of the order itself.

Rule discharged.

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HOLMES *against* MENTZE.

Tuesday, Nov. 10th.

Under *s.* 6. of the Interpleader Act, 1 & 2 *W.* 4. *c.* 58., the Court will not make a rule for the protection of a sheriff who has levied under a fi. fa., merely because a partner of the debtor has given notice to the sheriff to quit possession on the ground that the goods are partnership property and that the debtor has no beneficial interest in them, being indebted to the firm beyond the amount of his share in the effects.

The sheriff's duty is to sell the share, though he may not be able to ascertain the amount of actual interest.

But the Court will, in the above case, interfere under the act for the sheriff's protection, if the creditor disputes the partnership.

And where the creditor, having appeared under the interpleader rule and not contested the partnership, whereupon the rule was dismissed, afterwards refused to admit it, and ruled the sheriff to return the writ, the Court enlarged the latter rule till the creditor should indemnify the sheriff.

A RULE was obtained in *Easter* term last, under the Interpleader Act, 1 & 2 *W.* 4. *c.* 58., on behalf of the sheriff of *Lancashire*, calling on the plaintiff and *John Heap* to appear and state their respective claims to certain wine and spirits, seized by the sheriff under a fi. fa. in this cause, or else relinquish the same, &c. The goods were taken in execution, *February* 17th 1835, upon a judgment entered up against the defendant on a warrant of attorney given by him to the plaintiff, and bearing date *November* 17th 1834. The defendant was a wine merchant. His name, and no other, appeared over the premises (vaults and cellars in *Manchester*) on which the seizure was made. The officer who seized was served, the day after, with a notice addressed to the plaintiff, his attornies, &c., the sheriff, and the officer, signed by *John Heap*, and stating that all the goods taken in execution were the property of a partnership between *Heap* and the defendant, carried on under the firm of *Mentze* and Co.; that the defendant had not any property, part or share in the said goods, but was considerably indebted to *Heap* on the balance of the partnership accounts; and that *Heap* was alone beneficially entitled to and interested in all the goods, property and effects of the said partnership. He therefore required the parties addressed by the notice to quit possession; and stated

that,

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that, if this were not done, he should commence against them respectively such actions, suits, and other proceedings as might be advised.

In answer to the present rule, *Heap* filed an affidavit, repeating the statements in the notice, and adding more particular ones; and alleging, further, that the defendant, in 1831, became his partner in the wine and spirit business, carried on in *Manchester:* that, on a balance of account taken in *June* 1834, the defendant was found to owe the partnership 2557*l*, which debt had not been reduced but increased: and that the damages recovered in this suit were due from the defendant on his own account solely, the plaintiff being unknown to *Heap*, and having no demand against the partnership.

Sir *J. Campbell*, Attorney-General, and *M. Chambers*, for the plaintiff. This is not a case within stat. 1 & 2 *W.* 4. *c.* 58. *s.* 6. No issue could be directed under the statute. The sheriff is not "exposed to the hazard" of an action. *Heap*, by his own statement, admits that the defendant is interested in the goods as his partner. The seizure, therefore, could not be a trespass. The sheriff had a right to take the goods, and to sell the defendant's interest in them. As to the quantity of interest, the Court will not hear equitable claims discussed on an application under this act; *Sturgess* v. *Claude* (*a*).

Sir *W. W. Follett* and *Knowles*, for the sheriff. It is true that the right to seize is not disputed; but the

(*a*) 1 *Dowl. P. C.* 505.

question

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question is, whether the sheriff can sell, *Heap* claiming the entire property in the goods. The sheriff is threatened with an action by the notice, and is, therefore, entitled to protection under the statute. If he is to sell, must he sell the goods as the defendant's property, or as that of the partnership? In the one case, *Heap* threatens to proceed against him; in the other, the execution creditor will hold him liable for not having sold at the best price that might have been obtained. [*Coleridge* J. Have you had any communication on the subject with the execution creditor? Must not there be an actual dispute to entitle the sheriff to assistance? (*a*)] The creditor appears under this rule, and requires the sheriff to sell the goods as the defendant's. [*Patteson* J. For the amount of his interest in them.] It is disputed whether he has any interest in them, as partner, at all. The plaintiff causes a warrant to issue, commanding the sheriff's officer to levy on goods stated to be the defendant's. Then notice is given to the officer by *Heap*, that the defendant has no property in the goods, but that *Heap* alone is beneficially interested in all the partnership effects. To put the goods up for sale, giving special notice of the circumstances, would not be a proper course. If it were so, it might be adopted in every case where the assistance of this Court is now sought for. The sheriff (but for the statute) is bound to decide, at his peril, whether the goods are liable to be sold, or are the property of the adverse claimant, and must act upon his discretion. In a case under this act, before *Taunton* J., and in which he consulted the rest of the

(*a*) See *Isaac* v. *Spilsbury*, 10 *Bing.* 8.

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Judges (*a*), the third party claimed in respect, not of the entire property, but of a lien. There it might have been said that the property could be offered for sale, with notice of the alleged claim to which it was subject; but the case was held to be within the protection of sect. 6. The material inquiry, in this case, will be, whether the defendant is entitled to the whole property, or only to an interest, with other persons. [*Coleridge* J. Quâcunque viâ, the sheriff may sell.] The question is, whether he shall sell the property as the defendant's, or as that of the defendant and others. If the Court directed an issue, it would be, whether the goods were partnership property or not: and, if they were, what was the defendant's interest. The power which, it is said, the sheriff may exercise, of selling subject to an alleged partnership interest, is not clear. In *Burton* v. *Green* (*b*), where a fi. fa. had issued against one of three partners, and it was contended that the sheriff ought to have levied on the partnership property to the extent of one third, Lord *Tenterden* said, "I am not quite satisfied as to the interest which the sheriff might have sold under the execution. There is great difficulty in making the sheriff a tenant in common with the partners."

Sir *F. Pollock* and *Tomlinson*, on behalf of *Heap*, referred to *Harvey* v. *Crickett* (*c*), in answer to the above dictum; and they requested that the Court would not discharge the rule without putting the case in a course of investigation.

(*a*) Probably *Ford* v. *Baynton*, 1 *Dowl P. C.* 357.
(*b*) 3 *Car. & P.* 506. (*c*) 5 *M. & S.* 336.

Lord

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Lord DENMAN C. J. The sheriff, in this case, is called upon to seize goods of the defendant, at the plaintiff's suit, but a third party, alleging that the defendant is his partner, requires the sheriff not to act, because the defendant is indebted to the partnership in more than the amount of his share. That does not interfere with the sheriff's duty. He is to sell for such interest as the defendant has as partner; not for the degree of right which he may be found to have, on a winding up of the affairs, because, if the sheriff waited till that could be ascertained, the goods might remain unsold for an indefinite time. Under the law as it formerly stood, and it is the same now, the sheriff, in a case of partnership, must, however inconvenient it may be, sell the share of the defendant partner, and make the purchaser tenant in common with the other partners; and the purchaser must do the best he can to ascertain what interest there is. My brother *Coleridge* says that, in the Court of Common Pleas, it is usual, on a rule of this kind, to require that some actual communication should have been made by an adverse claimant. As to *Heap*, I do not think an adverse claim is asserted by his merely saying "I am a partner of the defendant." If, however, the execution creditor should insist upon the goods being sold as the property not of a partnership but of the debtor alone, the sheriff ought to have an indemnity.

PATTESON J. If it be conceded that the goods are partnership property, there is no difficulty in the case. Otherwise, the sheriff is between two fires; he must sell the goods as partnership property or not, and either

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way he may be liable. If the execution creditor insists on his selling the property as that of the defendant alone, the sheriff ought to have time to return the writ, unless indemnified.

WILLIAMS and COLERIDGE Js. concurred.

The rule was discharged, it being understood that the sheriff should make a further application to the Court if it became necessary.

On the day after this decision (*November* 11th) the sheriff's agent wrote to the plaintiff's attorney, requesting to know whether the plaintiff admitted or denied the partnership between *Heap* and the defendant, stating that in the latter case he should require an indemnity, and desiring to know if it would be given. The plaintiff's attorney wrote in answer: "Acting under the advice of counsel, I am not prepared to make the admissions you desire." The sheriff's agent again inquired if an indemnity would be given, but obtained no reply. On the 11th of *November* the plaintiff's attorney took out a rule calling on the sheriff to return the writ. On a subsequent day of the term, a rule was obtained, enlarging the time for the sheriff to return the writ, and calling on the plaintiff to shew cause why the rule of *November* 11th should not be enlarged until the plaintiff should indemnify the sheriff to the satisfaction of the Master. On the 25th of *November*,

Sir *J. Campbell*, Attorney-General, and *M. Chambers*, shewed cause. There is no authority for the interference

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terference claimed. The risk against which the sheriff seeks indemnity is the ordinary one, which the law casts upon him, and for which his poundage is the consideration. It is the right of an execution creditor to have his execution carried into effect. In the case, indeed, of a disputed bankruptcy, where a distinct issue at law may be tried, execution has sometimes been stayed till after such trial; but where partners of the debtor have applied for time to be given to the sheriff till an account could be taken of the debtor's interest, or the claims upon the partnership, it has been held that execution ought not to be suspended for those purposes; *Parker* v. *Pistor* (*a*), *Chapman* v. *Koops* (*b*). It makes no difference that the application here proceeds from the sheriff. The situation of a sheriff executing process against goods to which there are adverse claims is too favourably considered in *Beavan* v. *Dawson* (*c*), and more justly in *Carlisle* v. *Garland* (*d*). Here, he must exercise his own discretion.

Knowles, contrà, was stopped by the Court.

PATTESON J. (*e*) When this case was before the Court on the rule under the Interpleader Act, the plaintiff did not dispute the fact of the goods being partnership property. If he had, the case would have been within the act, and we should have granted a rule accordingly. Now he refuses to admit the partnership, and calls upon the sheriff to sell at his own risk. He has misconducted himself towards the Court, and we

(*a*) 3 *B.* & *P.* 288.
(*b*) 3 *B.* & *P.* 289.
(*c*) 6 *Bing.* 566.
(*d*) 7 *Bing.* 298.
(*e*) Lord *Denman* C. J. was absent.

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shall interfere for the sheriff's protection. The rule must be absolute.

WILLIAMS and COLERIDGE Js. concurred.

Rule absolute.

Tuesday, Nov. 9th.

TIBBITS, Gent., One, &c. *against* YORKE.

By one section of an act of parliament, it was enacted, that money allowed by commissioners of a navigation, to their clerk, appointed by them, should be paid by the proprietors of the tolls on the navigation, in certain proportions. A subsequent section enacted that, if any proprietor should neglect or refuse to pay on demand made either of him or his agent, the money might be recovered by action of debt, &c., *with double costs*, in the clerk's name, against such proprietor, or, if he could not be found, against his agent; or otherwise the sum might be levied by distress upon the goods of the proprietor, or, if no such goods could be found, on the goods of his agent.

The clerk obtained a verdict in debt against a proprietor, on an issue of nil debet, but had averred no demand in the declaration:

Held, that the right of action was given by the two sections conjointly: that the demand, if necessary to the action, must be presumed after verdict; and, therefore, that the declaration must be considered as framed, and the verdict recovered, under both sections, and that the plaintiff was entitled to double costs.

DEBT. The declaration contained four counts.

The first count stated, in the introductory part, that the defendant, on &c., was the proprietor of the tolls arising from the navigation of the river *Nene*, in *Northamptonshire*, between *Oundle* North Bridge and *Thrapston* Bridge mentioned in an act of 34 *G.* 3. (*a*)

Third

(*a*) Stat. 34 *G.* 3. *c.* 85., for removing certain difficulties in two acts passed for making the river *Nine* or *Nene* navigable.

Sect. 6. authorises the commissioners mentioned in the act to continue the then present clerk to the commissioners, or to discharge him and elect another, and to elect a clerk from time to time; and to allow and appoint to be paid to such clerk such reasonable sums of money, for his attendance, &c., as they shall think proper, to be raised and paid as thereinafter expressed.

Sect. 7. enacts, "that one moiety of the money to be allowed to such clerk shall be paid by the proprietor or proprietors for the time being of the tolls and duties arising from the said navigation between *Peterborough* and *Oundle* North Bridge, and the other moiety thereof by the proprietor or proprietors for the time being of the tolls and duties arising from

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Third count. Whereas the said defendant, so being such proprietor as in the first count mentioned, afterwards, to wit on &c., at &c., as such proprietor, was indebted to the said plaintiff, as clerk to the commissioners, acting &c., duly elected &c., in the further sum of 87*l.*, the moiety of a certain sum of 174*l.*, before that time duly allowed and appointed to be paid to the plaintiff by certain of the said commissioners, not being less &c. (stating the fulfilment of the formal requisites for a meeting of the commissioners), the same being a reasonable sum of money for his attendance, &c., as such clerk, for a long space &c., and to be paid by the defendant, so being the proprietor of such tolls, &c., to the plaintiff, when he should be requested, whereby and by reason &c.

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from the said navigation between *Oundle* North Bridge and *Thrapston* Bridge."

Sect. 9. enacts, "That if any or either of the proprietors of the said tolls and duties shall neglect or refuse to pay such sum or sums of money which shall be allowed, and which shall become due or payable to such clerk," . . . "*upon demand thereof made* either of such proprietor or proprietors by whom the same ought to be paid, or of the agent or agents of such proprietor or proprietors, who shall be collector or receiver of the tolls or duties of the said navigation for such proprietor or proprietors, then and in every such case such sum or sums of money shall and may be recovered by action of debt, or upon the case or promise, *with double costs of suit;* such action to be brought in the name of such clerk" . . . "to whom such sum or sums of money shall be due or payable, against the proprietor or proprietors of such tolls or duties, who ought to pay the same under the directions of this act; and if such proprietor or proprietors of the said navigation cannot be found, then any such action may be brought against the agent or agents in the receipt of the tolls or duties of such proprietor or proprietors; or otherwise such sum or sums of money shall or may be levied upon the goods and chattels of the proprietor or proprietors refusing or neglecting to pay the same, by warrant of distress, under the hands and seals of two or more of his Majesty's justices," &c.; and if goods of the proprietors are not found within the jurisdiction, then on the goods of their agents.

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TURNEY against YORKE.

Plea, nil debet, and issue thereon.

On the trial before *Littledale* J., at the *Northampton* Summer Assizes 1831, the plaintiff had a verdict for 87*l.*, subject to the opinion of this Court upon a special case. The case was argued in *Michaelmas* term 1833 (*a*), and the postea was ordered to be delivered to the plaintiff. Some doubts having afterwards arisen as to the effect of the judgment of the Court, a verdict was entered for the plaintiff on the third count, and the jury were discharged as to the rest. On the taxation of costs, the plaintiff contended that he was entitled to double costs, by the ninth section of the act. The defendant contended that, as the third count, on which the judgment was entered, contained no averment of the special demand which was required by sect. 9., the judgment could not be understood to be recovered on that section. The Master having allowed the double costs, Sir *W. W. Follett*, Solicitor-General, in *Hilary* term last, obtained a rule nisi for reviewing the taxation.

Sir *F. Pollock* and *Miller* now shewed cause (*b*). The ninth section is the only one which expressly gives the right of action: after verdict, therefore, all which is necessary to support an action on that count (including demand, if that be essential) will be presumed. It will be said that the seventh section directs that the proprietors shall pay, and, therefore, gives a right of action independently of the ninth. Perhaps, if the sixth and seventh sections stood alone, they might, by implication, entitle the commissioners to pay the clerk, and sue the

(*a*) See *Tibbits* v. *Yorke*, 5 *B.* & *Ad.* 605.

(*b*) Before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

proprietors;

proprietors; or, possibly, they might entitle the clerk to sue the proprietors in the first instance. But, however that might be, it is clear that the act, by going on in the ninth section to give, expressly, the right of action upon certain requisites being fulfilled, limits the right of action altogether to the case in which they are fulfilled. The action, therefore, does not lie independently of sect. 9., and the plaintiff is entitled to double costs.

Sir *W. W. Follett* and *Humfrey*, contrà. If the ninth section be the only one which gives the right of action, the argument on the other side is correct. But when two sections of an act give, each being taken alone, a right of action, and a record states all that is necessary to bring the case within one section, but omits a fact which is necessary to bring the case within the other, the judgment must be referred to the former only. The intention of the legislature appears to have been to give the double costs, and exact the particular requisites of the ninth section, in cases only where the extraordinary remedies, given by that section, should be resorted to.

Lord DENMAN C. J., in this term, *November* 25th, delivered the judgment of the Court.

This was a rule calling on the plaintiff to shew cause why the master should not review his taxation of costs. Upon the argument, the Court disposed of all the points which were discussed, except that of the right of the plaintiff to double costs (*a*), the verdict being taken on the third count of the declaration. The

(*a*) The others have been passed over in the report, being of no general importance.

action

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action was brought by the clerk of certain commissioners under an act of 34 G. 3. c. 85., respecting the navigation of the river *Nene*; by the seventh section of which it is provided that the clerk's salary shall be paid by the proprietors of the navigation, and, by the ninth section, that, if the proprietors shall neglect or refuse to pay, *upon demand thereof made*, such sum may be recovered by action of debt.

The third count of the declaration in this case is in debt, stating generally that the defendant, as proprietor, was indebted to the plaintiff as clerk duly elected, in a sum of money duly allowed to the plaintiff by the commissioners, but does not state any demand made of such sum. It is contended for the defendant that this count is framed on the seventh section, which does not give double costs, and that it cannot be taken as framed on the ninth section, which does give double costs, for want of any averment of a demand. But, on considering the clauses of the act, we are of opinion that the action is given to the clerk by the seventh and ninth sections conjointly, and that the third count must be taken as framed on both sections. Whether the objection to that count for want of an averment of demand would have been fatal on a special demurrer or not, we do not think it necessary for us to determine, inasmuch as the question arises after verdict, and, if the demand be necessary to the maintenance of the action, it must be presumed, after verdict on an issue of nil debet, that it was proved at the trial. Nor do we feel fettered by any thing which passed in this case upon any former occasion (*a*).

(*a*) Some argument had been raised respecting the effect of the judgment, as inferred from what had passed on the arguing of the special case, and a subsequent discussion as to how the judgment was to be entered.

Upon

Upon the whole, we are of opinion that the Master has done right in taxing the plaintiff double costs, and that this rule must be discharged.

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TIBBITS *against* YORKE.

Rule discharged.

The KING *against* ROUND.

Wednesday, Nov. 11th.

A MANDAMUS issued, directed to *Benjamin Round*, surveyor of the highways in the parish of *Wednesbury* in *Staffordshire*, to the effect following. "Whereas we have been given to understand, &c., that you exercised the office of a surveyor of the highways within the parish of *Wednesbury*, from *Michaelmas* 1827 to the 6th day of *October* 1832, or for some part of the time, and that divers books of accounts, assessments, rates, and other documents relating to the highways within the said parish, during the aforesaid period of your serving the said office, or some part thereof, are now in your custody, power or possession, and which said several books, &c., of right ought to be delivered to *John Addison* and *Simeon Constable*, churchwardens of the said parish, to be kept for the use of such parish; and whereas we have further been given to understand that, although you have been oftentimes required on behalf of the said churchwardens of the said parish to deliver to them the said books, &c., to be kept, &c., yet you, well knowing &c., but not regarding &c., have hitherto neglected and refused, and yet do neglect and refuse, to deliver up the same or any

A mandamus suggested that defendant was surveyor of the highways for a time named, and now expired; and that divers books of accounts, &c., relating to the highways, during his time of office, were now in his possession, and ought to be delivered to the churchwardens, and that he had been often required so to deliver them, and had refused; and the mandamus commanded him to deliver to the churchwardens all books, &c., in his possession, or shew cause to the contrary.

Defendant returned that he had not, on the day of the teste of the mandamus, nor since, nor now, nor when he was required on behalf of the churchwardens, any books, &c., in his possession; not stating whether he had them in his possession between the times of the requisition and the teste, nor what he had done with them:

Held, a good return, but the Court gave the defendant no costs of the mandamus.

or

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or either of them to the said churchwardens for the purpose aforesaid, but, on the contrary thereof, still unjustly detain the same in your custody, possession, or power, in contempt &c., and to the great damage &c., whereupon they have humbly &c., and we, being willing &c., do command you, firmly enjoining you that, immediately after the receipt of this our writ, you do without delay deliver or cause to be delivered to the said *John Addison* and *Simeon Constable*, churchwardens &c., all books of accounts, assessments, rates, and other documents whatsoever in your custody, power, or possession, relating to the highways within the said parish, during the period of your serving the said office, or any part thereof, to be kept &c., or that you shew cause to the contrary thereof, &c." Tested the 7th of *May*, 4 *W.* 4.

The defendant returned as follows: "That I had not, on the 7th day of *May* 1834, nor have since hitherto had, nor now have, in my custody, power, or possession, any book or books of accounts, assessment or assessments, rate or rates, or other document or documents whatsoever relating to the highways within the parish of *Wednesbury*, for or during the period of my serving the office of a surveyor of the highways within the said parish, or for or during any part of such period, nor had I any such in my custody, power, or possession, when I was required on behalf of the within named churchwardens to deliver the same to them: therefore I am unable to deliver any such to the within named *John Addison* and *Simeon Constable*, as within I am commanded."

A concilium having been obtained, the case was set down for argument in the crown paper, and now,

Sir

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Sir *F. Pollock* objected to the return. The duty of a surveyor is pointed out by stat. 13 *G.* 3. *c.* 78. *s.* 48., which directs him, at the expiration of his office, to transmit certain books and assessments to the churchwarden or overseer. This mandamus requires the defendant to do so, or to shew cause to the contrary. His answer is that he has not the documents now, and had them not on the day of the teste of the mandamus, nor since, nor when he was required to deliver them, on behalf of the churchwardens. The date of the requisition on behalf of the churchwardens does not appear from either the mandamus or the return. In the first place, he does not deny the possession of them during the interval between the requisition by the churchwardens and the teste of the writ. But, secondly, even if he did so, the return would be insufficient. He does not deny the possession of them during his term of office; and he ought to tell the Court what he has done with them; whether he has delivered them over to the proper parties or not. It is consistent with this return that he may have destroyed, or lost them, or placed them in the hands of his own attorney. The Court will require to know where the thing demanded is, in order that, if it shall seem fit, steps may be taken to obtain it from the person in whose hands it is. Besides, many persons do not know whether, legally speaking, a thing be in their custody or not. The Court is to judge of that. Here the defendant takes upon himself to state the legal conclusion.

Sir *W. W. Follett*, contrà, was stopped by the Court.

PATTESON

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PATTESON J. (a) In the absence of authority, I feel no doubt on this point. The mandamus directs that a certain thing shall be done; "that, immediately after the receipt of this our writ, you do without delay deliver or cause to be delivered" to the persons named "all books of accounts, assessments, rates, and other documents whatsoever in your custody, power, or possession." The party returns more, perhaps, than is necessary; for he first returns that he had not possession of any books, &c., on the 7th of *May*, the day of the teste of the writ, nor since, nor now; and then he goes on to say that he had no such possession when required to deliver them on behalf of the churchwardens. That I think unnecessary; for he is not required to deliver all he had then, but all he had at the time of the writ issuing. Then an inference is suggested, that, because he does not say that he had not possession in the interval between the time when he was required by the churchwardens, and the issuing of the writ, he may have had it in that interval. Suppose that a legitimate inference; suppose he had the possession in the interval; if he has it not now, he cannot deliver up the books. Sir *F. Pollock* says, that the possession is a matter of legal construction. I do not say, that it is a simple matter of fact; but it is, at least, a mixed question. The allegation is traversable; and an action for a false return will lie if it be untrue. The return is, therefore, not insufficient on the face of it. If any authority were cited to shew that the party, in his return to such a mandamus, is bound to shew what he has done

(a) Lord *Denman* C. J. had left the Court.

with

with the thing demanded, this return might be objectionable: but no such authority has been cited, and, I think, none such exists.

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WILLIAMS J. Supposing Sir *F. Pollock*'s argument to be well founded, an action would lie for a false return; and the fact suggested, of possession by the attorney of the party, would be conclusive against him.

COLERIDGE J. concurred.

Sir *W. W. Follett* then applied for costs.

PATTESON J. I think the party might have made a fuller return.

Return affirmed without costs (*a*).

(*a*) See *Rex* v. *Williams*, 8 *B.* & *C.* 681. *Rex* v. *Hill*, 1 *Show.* 253. *Rex* v. *Penrice*, 2 *Str.* 1235.

The KING *against* The Inhabitants of WILLOUGHBY.

Wednesday, Nov. 11th.

ON appeal against an order of two justices, whereby *William Roddes* was removed from the parish of *Byfield* in *Northamptonshire*, to the parish of *Willoughby* in *Warwickshire*, the sessions confirmed the order, subject to the opinion of this Court upon the following case.

Pauper hired a house in *W.* at 17*l.* per annum, for a year, (1832, 1833), and resided in it, and occupied it for a year. After the expiration of the year, while some rent was unpaid, he was removed to *B.* The order was appealed against. Pending the appeal, the pauper returned to *W.*, resided in the house from the 7th of *December* 1833, to the 27th of *January* 1834, and paid the arrear of rent due for the expired year. On the 1st of *January*, the order of removal was, upon the appeal, confirmed on the merits:

Held, that the pauper gained a settlement at the time of the payment of the arrear, and that the confirmation of the order of removal shewed only that he had not completed a settlement at the time of the order.

The

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The pauper rented a house at *Willoughby* from *Michaelmas* 1832, to *Michaelmas* 1833, at the yearly rent of 17*l.* He occupied the house under this hiring for the whole year, and, in *July*, paid half a year's rent. He continued to occupy this house until the 6th of *December* 1833, without paying any more rent. On that day he was removed with his family from *Willoughby* to *Byfield*, having become chargeable to *Willoughby*, against which removal *Byfield* appealed. The appeal was tried on the 1st of *January* 1834, and the order confirmed on the merits. On the 7th of *December* 1833, the pauper's family returned to their house at *Willoughby*, and, on the next day, the pauper himself returned, and remained in the same house until the 27th of the following *January*. On the 11th of *December* 1833, the pauper borrowed 8*l.* 10*s.*, and paid his landlord his second half year's rent, due at the preceding *Michaelmas*. The pauper, when he returned to *Willoughby*, had no means of subsistence except the residue of the sum he had received by way of relief from *Willoughby* before his removal; and, when that was exhausted, he applied to the same parish for more, which application however was refused. He then applied to *Byfield* for relief, whilst he was residing in *Willoughby*. This was about the middle of *January*; and, on the 27th of that month, he left *Willoughby* with his family and went to *Byfield*, where he remained until the 17th of the following *March*; he was then removed by an order of magistrates back to *Willoughby*; and against that order the parish of *Willoughby* appealed.

The question for the opinion of this Court was, whether or not the pauper gained a settlement in *Willoughby*

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loughby subsequently to the order of removal of the 6th of *December* 1833.

Humfrey and *Wildman* in support of the order of sessions. It must be admitted that, at the time of the first removal, 6th *December* 1833, the pauper had not gained a complete settlement, because he had not paid the rent, as required by stat. 1 *W.* 4. *c.* 18. *s.* 1. And this is all that the confirmation of the order, on 1st *January* 1834, establishes. But the payment of the arrear of rent, on the 11th of *December* 1833, completed the settlement, which was merely inchoate on the 6th of *December*. The order of removal did not put an end to the contract between the landlord and tenant; *Rex* v. *Fillongley* (*a*); *Rex* v. *Barham* (*b*). It is true that those cases were decided, respectively, under the statutes 13 & 14 *C.* 2. *c.* 12. *s.* 1., and 59 *G.* 3. *c.* 50, and that the present case must be decided under stat. 1 *W.* 4. *c.* 18. *s.* 1. But, so far as the present question is concerned, there is no difference between the several statutes. It does not, indeed, appear, from the report of *Rex* v. *Barham* (*b*), how long the rent was in arrear before it was actually paid; but there is no statutory regulation prescribing how soon it must be paid. The settlement is now not complete till payment; but it is not destroyed by the delay. The stat. 59 *G.* 3. *c.* 50. enacts that no person shall acquire a settlement by reason of dwelling for forty days in any tenement rented by such person, unless (among other requisites) the rent be actually paid, for the term of one year at least, by the person hiring the same. Then stat. 6 *G.* 4. *c.* 57. *s.* 2.

(*a*) 2 *T. R.* 709.

(*b*) 8 *B.* & *C.* 99.

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alters the words "by or by reason of his or her dwelling for forty days in any tenement rented by such person," and provides that no person shall acquire a settlement by reason of settling upon, renting, &c., any tenement, unless the rent for the same be actually paid for the term of one whole year at the least. Here "settling" means the same thing as "dwelling for forty days;" settlement being, in fact, merely an implication drawn by the Court from the language of stat. 13 & 14 *Car.* 2. *c.* 12. *s.* 1., which allows removal, within forty days, of persons coming to settle in a tenement under the yearly value of 10*l.* Then stat. 1 *W.* 4. *c.* 18. *s.* 1. was passed for the purpose of preventing certain settlements which might have been acquired under the former acts; and it provides that no person shall acquire a settlement by reason of such yearly hiring, &c., unless the rent, to the amount of 10*l.* at the least, shall be paid by the person hiring. In all cases, it is the residence for forty days which gives the settlement, under stat. 13 & 14 *C.* 2. *c.* 12. *s.* 1., and the only question is, whether the restrictive conditions imposed by the later statutes be fulfilled: and no time is prescribed as to fulfilling the condition of paying the rent. *Rex* v. *Ampthill*(*a*) will be cited on the other side. There the pauper, after residing for a year in a house which he rented at 10*l.*, was removed before he had paid his rent; and, after the removal, he paid his rent: and it was held that, at the time of the removal (under stat. 59 *G.* 3. *c.* 50.), he had gained no settlement. That case is compatible with the decision of the sessions here: and *Bayley* J., in his judgment, proceeds upon the ground that the rent was not paid

(*a*) 2 *B.* & *C.* 847.

"at

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"at the time when the order of removal was made" (*a*). Here it is contended, that a settlement had been gained, not at the time of the order of removal, 6th *December* 1833, but on the payment of the rent. It is not necessary that a year of occupation, or of service, should be one entire year: a restriction of this nature was held not maintainable as to occupation of different tenements, under stat. 6 *G.* 4. *c.* 57. *s.* 2., in *Rex* v. *Ormesby* (*b*), and as to hiring and service, in *Rex* v. *Child Okeford* (*c*). As to the fact that the money, with which the rent was paid, was borrowed, that is immaterial; *Rex* v. *Kibworth Harcourt* (*d*). [The counsel opposing the order said they should not argue this point.] *Rex* v. *Kenilworth* (*e*) will be cited on the other side. There the pauper, being hired in *Birmingham* for a year, was removed before completing the year of service, and there was no appeal; but, afterwards, he returned to *Birmingham* and completed his year of service; and it was held that he gained no settlement. But the ground of that decision was, that the return of the pauper was illegal, and that the contract of hiring was dissolved by the removal. And in *Rex* v. *Fillongley* (*g*), where the settlement was by residence on a tenement, inchoate before a removal against which there had been no appeal, and completed afterwards, the settlement was supported; and Lord *Kenyon* distinguished the case from *Rex* v. *Kenilworth* (*e*), on the ground that the return to the tenement was not a return "in a state of vagrancy." The return in the present case was not

(*a*) Page 854. (*b*) 4 *B.* & *Ad.* 214.
(*c*) 3 *B.* & *Ad.* 809.
(*d*) 7 *B.* & *C.* 790. (Before stat. 1 *W.* 4. *c.* 18. *s.* 1.)
(*e*) 2 *T. R.* 598. (*g*) 2 *T. R.* 709.

 such;

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such; for the description in stat. 5 *G.* 4. *c.* 83. *s.* 3., "person returning to *and becoming chargeable* in any parish, township or place from whence he or she shall have been legally removed by an order of two justices of the peace," is inapplicable: the pauper had not become chargeable to *Willoughby*, from the time of his return till his payment of the rent, whatever probability there might be of his becoming so afterwards.

Waddington and *Miller*, contrà. There having been no settlement gained at the time of the removal on the 6th of *December* 1833, the question is, whether any has been gained since. It is true, as contended on the other side, that the settlement really rests upon the residence of forty days. In this case there has been a residence for forty days both before and since the order of removal, but no settlement was gained by residence before the order of removal, because a year's rent was not paid: no settlement has been gained by the forty days' residence since, because those forty days were part of a year in which the requisites of the statutes 6 *G.* 4. *c.* 57. *s.* 2. and 1 *W.* 4. *c.* 18. *s.* 1. were not complied with. The residence before, and that since, the 6th of *December*, must be considered as entirely distinct: the order of removal, confirmed upon appeal, intervenes, and prevents them from being connected. It is clear that the residence for forty days since the 6th of *December*, and the payment of the arrears of rent, will not alone confer a settlement. But it is said that the residence after the order of removal and the payment of the arrears, may be connected with the previous year of occupation. If that were allowed, a party might occupy, and pay rent, for a whole year during

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during which he resided elsewhere, and might afterwards commence residence within the parish, and in forty days gain a settlement, though he performed none of the requisites. Before stat. 59 G. 3. c. 50, it was necessary that there should be a residence with an interest. The late statutes imposed other conditions; and these must now be satisfied, and the residence of forty days be completed, in the year in respect of which the other requisites are complied with. *Rex* v. *Kenilworth* (*a*) shews that all the requisites must be performed after the removal, to give a subsequent settlement. It is said that *Buller* J., in that case, spoke of the contract of hiring and service as being dissolved by the order of removal; which ground cannot be taken here, since the contract between landlord and tenant cannot be so dissolved. But the main ground of decision was the necessity of a fresh settlement being gained, after the order of removal. The words of *Buller* J. are, "the act subsequent to the order of removal, by which he was to gain a settlement, should be complete in itself." *Rex* v. *Barham* (*b*) was decided on the peculiar language of stat. 59 G. 3. c. 50., as appears by Lord *Tenterden*'s judgment. The stat. 1 *W.* 4. c. 18. s. 1. requires that the tenement should "be actually occupied under such yearly hiring in the same parish or township." This restriction is not imposed by stat. 59 G. 3. c. 50; so that a residence, whether during or after the year of hiring, might be held sufficient. If, upon general principles, the requisites might be completed at any time, there could have been no doubt raised in *Rex* v. *Barham* (*b*). [*Patteson* J.

(*a*) 2 *T. R.* 598. (*b*) 8 *B. & C.* 99.

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Suppose the party to hire the tenement, to reside forty days, then to go away; but to perform, as he might, the requisite of occupation and the other requisites, for the whole year; would he not gain a settlement by that forty days' residence?] He would so; for he would, in that case, reside forty days in a year during which the statutory conditions had been complied with; but, in this case, that was not done until after the order of removal, which was too late. The case might have been very different, if the order of removal had been made in the middle of a year, before the rent was due, as in *Rex* v. *Fillongley* (*a*) and *Rex* v. *Barham* (*b*); but here the year was concluded, and the rent due at *Michaelmas*; then the order of removal comes in *December*, and, being confirmed upon appeal, is conclusive that no settlement was gained in *Willoughby* at that time. If a settlement, thus left incomplete, may be completed at any distance of time, by the payment of arrears of rent, that would override any number of intermediate settlements, and open a door to fraud, besides being productive of the greatest uncertainty and inconvenience. If a settlement was gained in this case, then, by the payment of a half year's rent alone, the pauper is in the same situation as if he had occupied the house for a year, and paid a year's rent, since the order of removal. To decide so would be virtually repealing the statutes 6 *G.* 4. *c.* 57. and 1 *W.* 4. *c.* 18.

PATTESON J. (*c*) It is necessary that the year's rent be wholly paid, under stat. 59 *G.* 3. *c.* 50., and 6 *G.* 4. *c.* 57. *s.* 2, and to the amount of 10*l.*, under 1 *W.* 4.

(*a*) 2 *T. R.* 709. (*b*) 8 *B. & C.* 99.

(*c*) Lord *Denman* C. J. was absent on account of indisposition.

c. 18.;

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c. 18.; but the Court has never held that the rent must be paid within the year, or within any limited time after its expiration. It is true that the statutes provide that there shall be no settlement unless the tenement be hired and occupied for a whole year, and the rent paid. It is contended that the substantial ground of the settlement is, not the hiring, nor the occupation, nor the payment for a year, but the residence for forty days. I do not deny that that is so. But the question is, what is the time within which the forty days' residence must take place? I think that it must be during the year of occupation: but it is conceded that, in the absence of any order of removal, a pauper may, after having resided forty days within the year for which he has hired the tenement, go away, and yet gain a settlement, provided he occupy and pay rent for the year. It is, therefore, immaterial at what time in the year the forty days' residence takes place, whether at the beginning, the middle, or the end of the year. In the present case, there is a residence of forty days during the year, and afterwards the settlement is completed by the occupation and the payment of rent. But there was an order of removal made before the settlement was so completed, the condition of payment not having been then fulfilled; which order was appealed against, and confirmed on the merits. Then the pauper came back and paid the rent, and so completed the fulfilment of the conditions. That payment, therefore, having fulfilled the only condition which remained to be completed, the settlement was perfected, unless that was prevented by the order of removal. It is sought to prevent the completion of the settlement, by urging that the order prevented the payment from

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being connected with the year in respect of which the other requisites had been fulfilled. I find no authority for such a position. *Rex* v. *Kenilworth* (*a*) does not go that length. Every judgment must be understood secundum subjectam materiam. There the pauper, who had been hired for a year, was removed before the year of service was out, and the order was unappealed against; he afterwards returned and served out the year. Suppose there had been an appeal, and the order had been quashed, and he had returned, and gone on with the service, and completed it, that would have given a good settlement: it would have been immaterial whether the completion took place before or after the order of sessions. And so *Buller* J. seems to think, for he says, "after the order of removal, unappealed from, the pauper could not legally return to the parish from whence he had been removed." Whether that be tenable in law, or not, I will not now inquire. But it appears, from this language, that the learned Judge was of opinion, that if the order had been *successfully* appealed against the pauper might have returned. He says that the order "put an end to the service." It is clear that that was the ground of his decision, whether correctly or not. But afterwards come the words relied upon here, in opposition to the order of sessions: "the act subsequent to the order of removal, by which he was to gain a settlement, should be complete in itself." It is sought to use these words without reference to the subject matter. By themselves, they might appear to warrant the argument; but when the rest of the passage is taken into consideration, they do not. If the con-

(*a*) 2 *T. R.* 598.

tract

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tract was put an end to, the pauper must, of course, begin his service again under another contract. I can find no other case which countenances the argument of the counsel opposing the order of sessions; and this argument seems to me, independently of the last cited case, to rest on no legal grounds. Is it contended that, where a parish removes a tenant, the contract between him and his landlord is put an end to? No such result is produced: the tenant may continue his occupation under the contract. It is true that the confirmation of the order by the sessions, in the present case, shews that there was no settlement completed at the time of the original order. Therefore the question is narrowed to this single point: when all the requisites are complete, is the acquisition of the settlement to be referred back to the anterior time or not? *Rex* v. *Ampthill* (*a*) shews clearly that it is not: for there it was held that the payment of rent, after the removal, did not make a settlement at the time of the removal. Then at what time is the settlement good? I have no difficulty in saying that it is at the time when the last requisite is fulfilled. The order of sessions, therefore, of *January* 1st, 1834, is no proof that the payment of rent did not complete the settlement, such completion being subsequent to the order of removal. The argument urged against the order of sessions, in the present case, would require that the rent, in order to the acquisition of a settlement, must, necessarily, be paid immediately at the end of the year. I lay no stress on the return of the pauper to the parish of *Willoughby*: the result would have been just the same if he had paid his rent without ever going near the parish again.

(*a*) 2 *B.* & *C.* 847.

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WILLIAMS J. A greater effect is attributed to the order of removal than is consistent with common sense or with law. The question is, whether the facts of this case shew that the conditions imposed by the statutes have been complied with. It seems to me that they have. I waited anxiously to hear whether any authority could be produced to shew that all the requisites must be completed within the year. No such authority was cited. The effect of the order of removal has been relied on; and some expressions of *Buller* J. have been brought to our notice. But here the rent is paid, whatever order of removal has been made; and I am aware of nothing, in an order of removal, which has a tendency to give a different effect to a payment after the order, from that which the payment would have had, if no order had been made. The language of *Buller* J. is perfectly consistent with his notion (whether right or wrong) that the order of removal dissolved the contract of hiring. Since that time, the same subject has been considered in other cases; and there may be a doubt whether, in such a case, the contract would be dissolved if the party returned. In *Rex* v. *Barton upon Irwell* (*a*) it was held that the commitment and imprisonment of the servant did not dissolve the contract of hiring. This, however, I mention merely as incidental to that general view of the effect of the order of removal, which *Buller* J. acted upon in *Rex* v. *Kenilworth* (*b*). In the present case, the rent was not paid at the time of the removal; so that the conditions necessary for a settlement were not then fulfilled. Afterwards it was paid; and there

(*a*) 2 *M.* & *S.* 329. (*b*) 2 *T. R.* 598.

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is no authority for saying that a settlement was not then gained.

COLERIDGE J. It is conceded by the counsel opposing the order of sessions, that a settlement might be good in a case where all the facts were as they are here, except the fact of the order of removal. They say, however, that there must be, subsequently to the order of removal, a performance of every act necessary to a settlement: and for this they cite *Rex* v. *Kenilworth* (*a*). But the ground upon which that case was decided prevents it from being any authority here; namely, that the order of removal effected a dissolution of the contract of hiring. If then a decision on that ground be not inconsistent with the view which we take here, is the dictum which appears in the judgment inconsistent with that view? The dictum must be construed with reference to the subject matter. Then is the effect of the order of removal inconsistent with our view of this case? The order of removal proves only the state of facts existing at the time. Supposing that there are ten requisites, of which only nine are performed, the settlement is incomplete: but when the tenth is performed, why is the settlement not to take effect unless the performance be at a particular time? No such limitation is imposed here, either by the statutes, or by the case of *Rex* v. *Kenilworth* (*a*).

Order of sessions confirmed.

(*a*) 2 *T. R.* 598.

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The KING *against* The Inhabitants of HATFIELD.

By an act for inclosing lands in several parishes and townships, it was directed that the allotments to be made in respect of certain messuages, &c., should be deemed part and parcel of the townships respectively in which the messuages, &c., were situate. And the commissioners under the act were directed, in their award, to make such orders as they should think necessary and proper concerning all public roads, "and in what township and parish the same are respectively situate," and by whom they ought to be repaired.

INDICTMENT against a township for non-repair of a highway. Plea, as to part of the road, Guilty: as to the residue, Not Guilty. On the trial before Lord *Denman* C. J. at the *Yorkshire* summer assizes, 1833, a verdict was given for the Crown, subject to the opinion of this Court upon the following case: —

The road in question is the road described and defined in the award hereinafter mentioned, in the following terms: "One other public road of the breadth of forty feet, branching out of the said *Bawtry* and *Selby Road*, near *Bearswood Green* aforesaid, and proceeding, in an Easterly direction, over a certain common called *Ferne Carr*, to *Stoopers Gate*, leading to *Sandtoft*; and which road we call *Sandtoft Road*." The boundary, on one side, of the road so described, formed, before the inclosure, the boundary of an ancient highway passing over the said common called *Ferne Carr*, in

The commissioners by their award directed that there should be certain roads. One of these, called the *Sandtoft* road, passed between new allotments. The road was ancient. The part of the common over which it ran, before the award, was in the township of *H.*, and the road was still in that township unless its situation was changed by the local act and the award. The new allotments on each side were declared by the award to be in other townships than *H.* The award did not say in what townships the road was situate, nor by whom it was repairable.

Held, that the act, by changing the local situation of the allotments, did not, as a consequence, change that of the adjoining portions of road, and therefore that the road in question continued to be in *H.*

Held, by Lord *Denman* C. J., that, where the herbage of a road becomes vested, by the General Inclosure Act (41 *G.* 3. *c.* 109.), sect. 11., in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietors.

Held, further, by the whole Court, that, under sect. 9. of the General Inclosure Act, a road continued, as well as a road newly made, under the award of commissioners of inclosure, must be declared by justices in special sessions to be fully completed and repaired, before the inhabitants of the district can be indicted for not repairing it.

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the same direction as the road above described, and the part of the common over which the road passed was then within the township of *Hatfield*. The ancient highway on the other side was open to the common without any defined boundary. By an act, 51 *G.* 3. *c.* xxx. (private), entitled "An act for inclosing lands in the parishes of *Hatfield*, *Thorne* and *Fishlake*, in the manor of *Haitefield*, in the West Riding of the county of *York*," after certain recitals, it was enacted, *s.* 39., that, after the common wastes in the act before mentioned should have been well and effectually drained, and the roadways and lands for sale set out and disposed of, and the several allotments in the act before mentioned should have been set out and allotted, the commissioners appointed by the act should in the next place assign, allot, set out, and divide the residue of such commons and waste grounds, one half among the owners of ancient messuages, cottages, &c., situate within the townships of *Hatfield*, *Thorne*, *Fishlake*, *Stainforth*, and *Sykehouse*, having right of common on the waste, and the remaining half among the owners of inclosed and open field land, meadow, &c. (with certain exceptions, not material here), in lieu of all rights of common and other interests of the said several owners in and upon the said commons and waste lands. And that all allotments made in respect of messuages, cottages and lands, &c., situate and being within the said township of *Hatfield*, together with &c. (certain allotments and parcels which need not be specified), should for ever thereafter be deemed and taken to be part and parcel of the said township of *Hatfield*. The like enactments were made respectively as to the several allotments in right of premises in the several other townships;

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townships; and it was enacted that all allotments from and out of the common wastes within the manor of *Haitefield* should, from and after the execution of the commissioners' award, be, and be taken to be, situate within the respective parishes and townships wherein the commissioners should, in and by the said award, allot, set out, and declare the same.

Section 55 directed the commissioners to make their award, which amongst other things was to contain "all such orders and directions as the said commissioners shall think necessary and proper concerning all public roads, ways, and drains, and in what township or parish the same are respectively situate, and by whom such roads, ways, and drains ought to be maintained and repaired."

The commissioners made their award, and thereby directed that there should be certain public roads over the commons in the said act mentioned, and amongst others the road in question, by the descriptions thereof above set forth. This road, beginning at the *Bawtry* and *Selby* road on the west, runs for 122 yards between ancient inclosures in the township of *Hatfield*; and as to that part the defendants pleaded Guilty. It then proceeds for 572 yards between new allotments, declared by the said award to be in the township of *Hatfield*, on the South, and new allotments, declared to be in the township of *Thorne*, on the North side; as to that, the defendants pleaded Guilty as to the part on the South side as far as the middle of the road, and Not Guilty as to the residue. The remainder of the road indicted runs between new allotments declared to be in the township of *Thorne* on the South side, and the townships of *Thorne*, *Fishlake*, and *Sykehouse*,

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on the North side; as to that the defendants pleaded Not Guilty. But the award omits to direct in what parish or township the roads shall be respectively deemed to be situate, or by whom such roads ought to be maintained and repaired. It did not appear on the trial by whom the road in question had been repaired. The prescriptive liability set forth in the indictment, and the fact of the indicted road being out of repair, were proved at the trial: but the prosecutors did not produce in evidence any such certificate of justices of the peace as is mentioned in the General Inclosure Act, stat. 41 *G.* 3. *c.* 109. *s.* 9.

The point reserved was, whether, under the circumstances stated, the township of *Hatfield* is liable to repair the whole of the indicted road, or only such parts of it as adjoin and lie nearest to the ancient inclosures situate in the township of *Hatfield*, and the new allotments which by the award are declared to be in the township of *Hatfield*, as to which parts the defendants pleaded Guilty as above mentioned. If the Court should be of opinion that the township was liable to repair those parts only as to which there was a plea of Guilty, a verdict of Not Guilty was to be entered: if the Court should think that the liability of the township to repair the said road extended beyond these parts, the verdict was to be entered accordingly.

Alexander for the Crown. The commissioners have stated in their award that, before the inclosure, the part of the common over which the road in question passed, was in the township of *Hatfield*. Nothing has taken place to change its locality. The allotments themselves are in those townships respectively in which the award

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award of the commissioners has placed them: but the authority so exercised has not altered the locality of anything but the allotments. The road cannot, by implication, be transferred with them. The judgments delivered in *Rex* v. *Morton Pitt* (*a*) apply to this point. Besides, a distinct power is given to the commissioners, by sect. 55. of the local act, to declare by their award, in what township or parish the public roads shall be situate. If the award as to allotments had the effect of such a declaration, the power to make it would have been superfluous. That power has not been exercised. It may be contended that, by the General Inclosure Act, 41 *G.* 3. *c.* 109. *s.* 11., where roads are set out by commissioners, the herbage upon the soil of such roads is given to the proprietors of the adjoining land on each side, as far as the crown of the road; that the party who has the herbage must be considered owner of the soil; and that in this case, therefore, the soil of the road must be considered as passing with the allotments on the two sides, and changing its locality with them. But the soil does not pass by grant of the herbage; *Co. Litt.* 4 b. Again, it may be said that by the general act, 41 *G.* 3. *c.* 109. *s.* 9., the township is not liable to repair till the road shall have been declared by justices in special sessions to be "fully and sufficiently formed, completed, and repaired:" and that no such declaration of justices has been made in the present case. But, on reference to sect. 8., and the former part of sect. 9., it is evident that this provision applies only where an entirely new road is set out by the commissioners, or where a portion of new road is

(*a*) 5 *B.* & *Ad.* 565.

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set out in addition to an old one. Here the road is old: nothing has been said by the commissioners of "setting out" the whole or any part of it.

Sir *F. Pollock* contrà. Section 9. of the General Inclosure Act applies to old roads continued, as well as to roads wholly or in part new. Section 11. declares that all roads, "which shall not be set out as aforesaid" by the commissioners, "shall be for ever stopped up and extinguished," and shall be deemed and taken as part of the lands to be divided, allotted and inclosed. The road in question is clearly not considered by the commissioners as stopped or extinguished, but as still existing; and is, therefore, in effect, set out by them. Either it is set out, or it is not now a public road. The words "as aforesaid," in the clause just referred to, are explained by section 9., where it is said that the commissioners shall appoint surveyors "for the first forming and completing such parts of the said carriage roads as shall be newly made, and for putting into complete repair such part of the same as shall have been previously made;" and, afterwards, it is said that the inhabitants of the parish, &c., shall not be charged towards forming or repairing the said roads respectively, till the same shall, by the justices, "be declared to be fully and sufficiently formed, completed and repaired;" that is, reddendo singula singulis, till the new parts shall be declared to have been completed, and the old put into repair: but that, for ever after, such roads shall be repairable as the other public roads within the parish, township, &c., are. And there is reason for this enactment, because the inclosure might throw so much traffic upon an old road, which before required little or no repair, that it would

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be the duty of the commissioners, in justice, to put such road in repair, as well as to complete a new one. It does not appear, in point of fact, that the road in question was ever repaired by the township, or repaired by any one, before the inclosure. Then, as to the locality of the road. The main object of the act was, to divide the lands and ascertain their limits; it probably did not occur to the legislature as necessary to say that, where allotments were in a township, the road which bounded them should be in the same; but it cannot have been contemplated that many thousand acres should be in a particular township, and the road through them be in another, as would happen here according to the argument on the other side. For preventing doubts in future, the allotments are placed by the act in certain townships, according to the situation of the lands in respect of which the allotments are made. This cannot have been meant to affect the allotments and not the roads. The act would, indeed, admit of such a construction, if convenience required it, but the Court will not adopt it here unless the words are imperative. (He then contended that the road in question did not clearly appear to be, locally, in the township of *Hatfield*; but this argument, turning merely upon the words used in the special case, is omitted. *The Court* was of opinion that the parties had intended to lay before them, as a fact, that the road was in the township; and had, substantially, submitted that fact.) It is true that the herbage may pass without the soil; but the provision in sect. 11. of the General Inclosure Act was probably not introduced with any view to such a question, but to do away with any possible presumption in favour of the lord of the manor (such as was suggested in *Doe dem.*

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Pring v. *Pearsey* (*a*)) as against the tenants of the land. The general legal presumption, which is aided by this clause, would be that the road was in the same township as the allotments through which it passed. Sect. 55. of the local act, which has been referred to, directs that the commissioners shall, in their award, make such orders as they think necessary and proper concerning the roads, and in what township or parish the same "are" (not "shall be") respectively situate. But the question is, whether, had there been no such section, the Court would have held that the allotments passed to the townships pointed out by the act, and that the roads did not. If the Court would not so have decided, the case is not altered by the circumstance of the commissioners having omitted in their award to declare in what township or parish the roads are.

Alexander, in reply. The inhabitants of *Hatfield* were liable to repair the road in question before the local act passed. There is nothing, either in that or in the General Inclosure Act, that points out a time when, in default of a certificate by justices, such liability shall cease. [*Patteson* J. Is any power given to the commissioners to direct that an old road shall continue? If it is not set out by the commissioners, it ceases to be a road.] If the commissioners do not give any direction in their award, the right of the public remains as it was. [*Patteson* J. Section 8. of the General Inclosure Act requires the commissioners to set out the public highways over the lands intended to be inclosed; by sect. 11. all roads over such lands, which shall not be set out as

(*a*) 7 *B.* & *C.* 304.

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aforesaid, shall be stopped up and extinguished, and be deemed part of the lands to be allotted and inclosed. And in the case of roads which are set out by the commissioners, section 9. expressly requires a certificate.] If the commissioners set out the way, they must also form or put it in repair, and there appears no reason for this, where a highway is already in existence. [*Coleridge* J. Their inclosing the land at the sides, which before was open, is a reason.]

Lord DENMAN C. J. The commissioners have not performed their duty, in omitting to declare, as the fifty-fifth section of the local act directed them to do, in what township or parish the road in question was situate; and we are, consequently, left to decide this case under perplexing circumstances. I am of opinion, upon the merits of the case, that there is nothing to take away the liability of the township of *Hatfield*. It is suggested that, in the General Inclosure Act, sect. 11., which gives the herbage on the road to the proprietors of the land on each side respectively, a presumption is recognised like that in *Doe dem. Pring* v. *Pearsey* (*a*), that the soil of the road belongs also to the same respective proprietors; and it appears to be inferred that the soil on each side of the road must be considered as passing to the same townships in which, by the local act, the neighbouring allotments are placed. But I do not think that any legal presumption can arise as to the ownership of soil in a road, where the road is defined for the first time under a newly-created authority. Then it is urged that the road must be considered,

(*a*) 7 *B.* & *C.* 304.

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for the present purpose, as part of the several allotments of which it forms the boundary. But it is clear that, in the local act, the allotment is contemplated as distinct from the road; for the act, by sect. 39., directs that, after the roadways and lands for sale shall have been set out and disposed of, the *residue* of the commons and wastes shall be assigned and allotted among the owners of messuages, having right of common, and the owners of inclosed and open field land. The merits of the case, therefore, are in favour of the liability of *Hatfield*. But the point raised as to the want of a certificate is not to be got over; and we must hold the defendants not liable, because the requisitions of stat. 41 *G.* 3. *c.* 109. *s.* 9. have not been complied with.

PATTESON J. I am of the same opinion. I am sorry that we must come to this decision; but the words of stat. 41 *G.* 3. *c.* 109. *s.* 9. are too plain to admit of any other. By that section, the commissioners are to provide for the first forming and completing of such parts of the carriage roads to be set out, as shall be newly made, and for putting into complete repair such part of the same as shall have been previously made. The clause, therefore, exactly meets this case. And, if so, there must be a certificate of justices before the township or parish can be called upon to repair. Upon the merits I quite agree in the opinion which my Lord has given. We cannot say that the road is part of the adjoining allotment, when the General Inclosure Act says (in sect. 11.) that the roads and ways not set out shall be stopped up and extinguished, and shall be deemed and taken as part of the lands to be divided, allotted, and inclosed, and shall be divided, allotted and inclosed

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accordingly. The road cannot be an adjunct to the allotment. It remains then in the same situation as before the inclosure.

WILLIAMS J. I also am of opinion that this road remains in the same township in which it was before. I think it sufficiently appears that the road was originally in *Hatfield;* and then the only question on this part of the case is, whether any thing has occurred to vary, and transfer to some other district, the liability under which *Hatfield* was to repair. I think it is clear that nothing has taken place which can have that effect. It seems to me that the fifty-fifth section of the local act makes the declaration of the commissioners, there mentioned, a condition precedent to the charging of any new district with repair of a road under that statute. But, as to the necessity of a certificate, I agree with the rest of the Court.

COLERIDGE J. I think that the defendants are entitled to an acquittal, on the objection taken as to a certificate. The road in question has no existence for the present purpose, unless it be "set out as aforesaid," according to the eleventh section of the General Act; and, under sect. 9., every road to be set out, as is there mentioned, must be declared by justices, in petty sessions, to be sufficiently formed, completed and repaired, before the inhabitants of the district shall be liable in respect of it. Unless, therefore, the words "set out" mean differently in sections 9. and 11., a certificate of justices was necessary before the defendants could be charged. Upon the merits, the verdict must have been for the Crown. If the case shews clearly (as I think it does,

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does, though not by express words) that the road in question was within the township of *Hatfield*, the inhabitants were liable, unless something had been done by the local act, or by the award, to take it out of the township. Nothing of that kind appears. The act changes the locality of the allotments only; and I think we cannot entertain the presumption suggested, that the adjoining road is transferred with them. We have no right to shift burdens in that manner.

Judgment for the defendants.

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Wednesday, Nov. 11th.

A pauper was removed by order of justices to the parish of *H.* (so named in the order), which consisted of several townships, maintaining their poor jointly. The order was acquiesced in. Afterwards one of the townships, *O.*, separated itself from the parish, under stat. 13 & 14 *Car.* 2. *c.* 12. *s.* 21., and from thenceforth maintained its own poor. The pauper was subsequently removed to the township of *O.* (so named in the order of removal) from the parish of *W.* On appeal against the order (the respondents having put in the order of removal to *H.*), *O.* offered evidence that the pauper was not settled in that particular township, before its separation from *H.* The sessions rejected the evidence.

Held, *Patteson* J. dubitante, that the former order upon *H.* was not conclusive against *O.* on appeal against an order directed to *O.* as a distinct township; and the case was sent back to be reheard.

ON appeal against an order of justices for the removal of *Rebecca Thompson* from the parish of *Westbromwich*, in *Staffordshire*, to the township of *Oldbury*, in *Shropshire*, the sessions confirmed the order, subject to the opinion of this Court upon the following case.

The parish of *Hales Owen* consists of the borough of *Hales Owen*, the township of *Oldbury*, and ten other divisions, situate in *Shropshire*, and three townships, *Lutley*, *Cradley*, and *Worley*, situate in *Worcestershire*.

The three *Worcestershire* townships have always supported their poor apart from each other and from the rest of the parish. The township of *Oldbury*, the borough of *Hales Owen*, and the ten divisions above mentioned, which lie in *Shropshire*, and which form the

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remaining part of the parish, have always, until the separation of the township of *Oldbury* from them, as hereinafter mentioned, supported their poor jointly; and the affairs of the parish had, until that event took place, been administered by the churchwardens and four overseers, appointed respectively for four quarters, *Oldbury* being one, into which that part of the parish was divided.

In *Trinity* term, 1832, this Court made a rule for a mandamus absolute (*a*), to compel the appointment of overseers for the township of *Oldbury*, pursuant to stat. 13 and 14 *Car.* 2. *c.* 12. *s.* 21.; and the last mentioned township has ever since that time maintained its own poor distinct and apart from the other parts of the parish.

In 1816 the pauper, together with her father and the rest of his family, was removed, by an order of justices, from the parish of *Harborne*, in the county of *Stafford*, to the said parish of *Hales Owen*, in the county of *Salop*, against which order no appeal was made; and no subsequent settlement has been gained by the pauper.

The pauper, having become chargeable to the parish of *Westbromwich*, where she resided, was removed to the township of *Oldbury*, by an order of justices, dated *January* 6th, 1834. Against this order an appeal was entered, and came on for hearing at the last *Easter* sessions for the county of *Stafford*. The appeal being called on, the respondents put in the order of removal by which the pauper and her father, and his family, were removed to the parish of *Hales Owen* in 1816.

The appellants then proposed to prove that the

(*a*) *Rex* v. *The Justices of Salop*, 3 *B.* & *Ad.* 910.

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pauper had never gained any settlement in the township of *Oldbury*, which was objected to by the respondents, who contended that, the last mentioned order being unappealed against, it was conclusive upon the parish of *Hales Owen* and every part thereof, and that, as *Oldbury* at that time formed part of the parish of *Hales Owen*, it was now estopped from disputing that the pauper's settlement was in that township. The Court of Quarter Sessions, being of this opinion, declined to hear the evidence for the appellants, and confirmed the order.

The question for the opinion of this Court was, whether, under the circumstances above stated, the township of *Oldbury* was precluded from contesting the question of the pauper's settlement in an appeal against the present order.

Corbett, in support of the order of sessions. An order of removal unappealed against is conclusive against the parish, or township, to which the removal was made; and that, although it subsequently appear that the district removed to was described in the order as a parish, whereas it is a hamlet or a township; *Spitalfields* v. *Bromley* (*a*), *Rex* v. *Kirkby Stephen* (*b*). It is no answer, in this case, that, at the time of the former removal, *Oldbury* was, for the purpose of maintaining the poor, a part of *Hales Owen*, and is now no longer so. A township may separate itself, for this purpose, from

(*a*) 18 *Vin. Ab.* 468. *Removal* (H). pl. 5.

(*b*) *Burr. S. C.* 664. The sessions may amend such erroneous order, on appeal: and in *Rex* v. *Bingley*, 4 *B.* & *Ad.* 567, note (*a*), this Court sent back such an order to the sessions for that purpose. See *Rex* v. *Cartmel*, 2 *A.* & *E.* 562.

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the parish of which it has formed part; and districts which have been so separated may re-unite (*a*); but it would be unjust if these alterations, made for the convenience of the inhabitants, could alter the liabilities contracted by such districts with respect to other parties. The rights and liabilities of the districts, relatively to each other, may be arranged among themselves. [Lord *Denman* C. J. You might have contended so here, if the order had been made upon *Hales Owen*, which was the name of the district formerly including *Oldbury*; but you select *Oldbury*, which is one portion of what formerly composed that district.] No case exactly like this has occurred, but *Rex* v. *Oakmere* (*b*) has some resemblance to it. [Lord *Denman* C. J. There a district newly formed into a township maintaining its own poor, was held not liable for the maintenance of a bastard born in it before the alteration; but *Abbott* C. J. relied upon the fact that the district was not situated in any parish or township before. Here you treat *Oldbury* as having been so situated. Why are you not bound to shew that the pauper's settlement, at that time, was within *Oldbury?*] As between third parties and the particular district, it is not necessary. [*Patteson* J. The result of the case, as you put it, seems to be that, since the separation, a third district may, at its pleasure, fix the pauper upon either *Oldbury* or *Hales Owen*.] The respondents contend only that the separated districts are not, by their division, to get rid of the liability altogether. [*Coleridge* J. Even as you put the case, if the appellants prevail, you only lose the benefit of an estoppel.] A great difficulty in proof is thrown upon the

(*a*) *Lane* v. *Cobham*, 7 *East*, 1. *Rex* v. *Palmer*, 8 *East*, 416.
(*b*) 5 *B.* & *Ald.* 775.

respondents,

respondents, the former removal having taken place so long ago.

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Whately, contrà. The former order, if conclusive at all, is so against *Hales Owen*. There is no instance of a district being concluded by an order in which it is not even named. And an order upon the parish of *Hales Owen*, generally, cannot have been good, since the parish at large never maintained its own poor; but was, at the time of the order, separated into two divisions for the purpose of the poor laws, one in *Worcestershire* and the other in *Shropshire*. There could not be a removal to *Hales Owen* as a parish maintaining its own poor. *Rex* v. *Bishop Wearmouth* (*a*) shews that an order for such removal could not be valid. On this point, *Spitalfields* v. *Bromley* (*b*) and *Rex* v. *Kirkby Stephen* (*c*) differ from the present case. The *Worcestershire* division would be like a separate parish as to the relief of the poor; *Case of St. Botolph without Aldgate* (*d*): and *Oldbury* formed no part of that division. If the order upon the parish of *Hales Owen* had been delivered to the overseers of one of the *Worcestershire* townships, *Oldbury* would never have heard of it. At all events, the appellants here should have been permitted to give evidence that the settlement was not, in point of fact, with them, since the order of removal was directed to them as the township of *Oldbury*: they could not, as the township, be concluded by an order on the parish of *Hales Owen*. [*Coleridge* J. Suppose the question here had been between two parishes unconnected with these districts, and one parish had put in the

(*a*) 5 *B.* & *Ad.* 942. (*b*) 18 *Vin. Abr.* 468. *Removal* (H). pl. 5.
(*c*) *Burr. S. C.* 664. (*d*) *Sir T. Ray.* 476.

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original order; would not that order, unappealed against, have been conclusive? And why should *Oldbury* be in a better situation than a distinct parish would be, because it once formed part of *Hales Owen?* In the case put, the parish concluded by the order would have been a stranger to it, as you say *Oldbury* would have been to an order served upon the *Worcestershire* division of *Hales Owen.*] At any rate, the objection that the original order, being upon *Hales Owen* generally, was invalid, would have prevented its being conclusive, even in the case of an independent parish. And if such an order as this is conclusive, after a separation, upon each of the separated districts, it rests with those who procure a subsequent order of removal, founded on the original one, to settle the pauper in one place or another, according to their caprice.

Lord DENMAN C. J. I feel great difficulty in this case, and the more, on account of doubts which are entertained on the Bench. When first I read the case, I thought that the original order, unappealed against, was conclusive upon every part of the parish to which it then applied; but, on consideration, I think it does not create an estoppel upon *Oldbury.* A difficulty arises as to the description of the parish in the former order. The case states that the removal, under that order, was to the parish of *Hales Owen,* in the county of *Salop.* Supposing that we should be justified in concluding that, by that description, the *Shropshire* division of *Hales Owen* was sufficiently identified, I think that *Oldbury,* having since become a separate township, is not estopped by that order: if it were so, persons removing a pauper under circumstances like the present, might settle him in

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in whichever district they chose to select. When the former order was made, the parish was the party charged; now it is the township of *Oldbury*; and, as those who remove say, that it is the township of *Oldbury* to which they remove the pauper, as settled there, I think they were bound to prove a settlement in that township. In *Rex* v. *Oakmere* (*a*) *Abbott* C. J. said, "The question is, whether the district newly created into a township under this statute," (for inclosing the forest of *Delamere*,) "which before was neither in any parish nor township, is to be considered as if it had formerly been a parish or township, with regard to settlements; or, only as becoming so from the time of its creation under the act, and as if it had formerly been wholly uninhabited." And (adopting the latter construction), he drew a distinction which appears to me applicable here. "This is not like the case of a modern appointment of overseers to places that formerly had no such officers; because all such places must have been vills from time immemorial, and consequently under a legal obligation to maintain their poor, and possessing a legal right to the appointment of officers, and by such appointment to remove persons under the same circumstances as other townships or parishes might do" (*b*). It seems to me, therefore, that, if this township is an ancient division which might formerly have maintained its own poor, then, when it obtained the right to have officers of its own, and to provide for its poor separately, it became liable to maintain those paupers whom it would have supported if it had been a separate division at an earlier period. We must, I think, take it, upon the

(*a*) 5 *B.* & *Ald.* 777. (*b*) P. 779.

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whole, that the township is not bound by the order upon *Hales Owen*. There are many difficulties in the case; the Court must deal with them as it can, if they arise; but I am of opinion that there is no estoppel.

Patteson J. I feel great difficulty in this case: I doubted, at first, whether the township was not estopped, and I still have doubts; but the rest of the Court is of opinion that no estoppel arose, and my doubts are not so strong as to lead me to say that I entirely differ. I take the order unappealed against to have been made upon the division of the parish in *Shropshire*. I think that was a good order. *Oldbury* was within the *Shropshire* division, and, if the pauper was settled in that district, he was as much settled in *Oldbury* as in any other part of it. The evidence which it was proposed to offer would not shew that the pauper was not settled in *Oldbury*, as regards any question between that township and a third township or parish, though its effect might be different as between *Oldbury* and the parts from which it has separated. But, if *Oldbury* could be so discharged, as to a third parish, any parish, by dividing itself, could get rid of the liability to maintain paupers which had been removed to it. On the other hand, if an estoppel arose here as to one district, it would as to more; and, if a parish separated itself into a number of divisions, any one of those, under circumstances like the present, might conclude any other. The case presents difficulties on both sides.

Williams J. There is certainly a difficulty in the case of the appellants, which my brother *Patteson* has pointed out; and there is, on the other hand, this considerable

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siderable difficulty, that, if we hold the pauper to be settled in each of the separated divisions alike, a party removing might, if there were twenty such divisions, fix on any he thought proper for the settlement. It comes to the question, whether or not the precise ground taken by the sessions, that is, the ground of estoppel, be maintainable. And, without calling in aid any doubtful argument, I think that the township and the parish here being now as distinct from each other as *Cumberland* from *Cornwall*, a decision that the pauper was settled in the one is not a decision that she is settled in the other. There is no estoppel, because the party whom it is sought to estop is not the party on whom the former order was made.

COLERIDGE J. The case is certainly difficult. I think it is not fairly to be decided on the ground of estoppel. The order formerly acquiesced in was a judgment in rem, and, as such, conclusive against all the world, and not upon a particular district by way of estoppel. But my ground of decision is this. The respondents were to prove a settlement in *Oldbury*; for that purpose they put in the former order. But that appears to be made upon a different party. Then they were to shew that, at the time when the order was made, *Hales Owen* and *Oldbury* were identical. The sessions excluded that inquiry prematurely; and upon that ground I think their order is bad. Difficulties may arise hereafter as to other parts of the case: but at the present step I think the sessions are wrong.

Order of sessions quashed. The case to go back to the sessions.

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Friday, Nov. 13th.

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E., being owner of a house, enlarged it, and inserted a window, at one end, in the part added, and, at another end, carried out the side walls, between which two windows formerly stood in a straight line, five feet, converting this end into a bow, and inserting two bow windows, in the same direction, but not in the same situation, as the two former. Held, that, whatever privilege against the obstruction of light the windows of the original house possessed, this privilege did not apply to the three new windows.

Before *E.*'s house was built, the land on which it was built, together with some adjoining land, belonged to *R.*, who conveyed the land on which the house was afterwards built to *C.*, and *C.* agreed to sell to *E.*, who entered and built the house. Afterwards, and before the enlargement above mentioned, *R.* joined in a conveyance with *C.* (each as to his own estate), by which the house, with all lights and easements appertaining, and an additional part of *R.*'s land, were granted to *E.* *E.* having afterwards enlarged (as above described): Held, that neither *R.*, nor his assignees, were precluded from obstructing the three new windows by building on the land adjoining.

After the enlargement, *E.* assigned to *O.*, and *R.* afterwards assigned an additional piece of the adjoining land to *O.*; this piece lay to the North of *O.*'s house, and, in the conveyance, its Southern boundary was described to be "the dwelling-house of *O.*" Held, that this did not operate as a recognition of the house in its then state, so as to preclude *R.*, or his assignees, from obstructing the new windows by building on other part of the adjoining land south of *O.*'s house.

In the case stated for the Court, by which it was agreed that the Court might draw conclusions of fact as a jury, it was stated that *R.*, at the time of his original conveyance to *C.*, was desirous of selling his land in building lots: The Court refused to take this into consideration, in interpreting the effect of the conveyance, which did not mention this, but called the land conveyed "arable land:" and they held that *R.* was not precluded by this conveyance from obstructing the lights of the house afterwards built.

After the conveyance by *R.* and *C.* to *E.*, *R.* was told, by *E.*'s architect, that alterations were going on, but *R.* did not know the precise alteration intended to be made as to the windows. *R.* was told of the precise nature of other alterations, to which he assented, reserving to himself leave to build on his own ground, up to the wall of the house, in a part which did not contain the new windows. The Court refused to infer, as a fact, such a legal instrument as might be necessary to convert *O.*'s house into a dominant, and *B.*'s land into a servient, tenement with respect to the lights.

THIS was an action for building a wall, and thereby darkening certain windows, and otherwise injuring the house, of the plaintiff.

On the trial before *Bosanquet* J., at the *Winchester* Spring assizes 1834, a verdict was taken for the Plaintiff, subject to the opinion of this Court on the following case:—

William Rolph, being seised in fee of a field called *The Seven Acres*, and wishing to sell it in building lots, by indenture, or deed of feoffment, with livery of seisin indorsed, dated 15th *May* 1816, between *William*

Rolph

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Rolph of the first part, *John Primer* of the second part, *Richard Close* of the third part, and *Charles Martill* of the fourth part, for the considerations therein mentioned, conveyed to the said *Richard Close*, in fee, all that piece of arable land lying on the West side of a field called *The Seven Acres*, situate, &c., —and which piece of land, admeasuring from North to South twenty-two feet, and from East to West *one hundred* feet, is bounded on the North by land of the said *William Rolph*, occupied by *Charles Martill*, on the East by land also of the said *William Rolph*, occupied by *Edward Rogers*, and on the West by *a road twelve feet wide next Southampton Common*, —as the same piece of land is now set out, and occupied by the said *R. Close*; together with all ways, paths, passages, waters, watercourses, commons, common of pasture feedings, timber and other trees, fences, easements, profits, advantages, emoluments, hereditaments, and appurtenances whatsoever, to the said piece of land belonging or appertaining, and the reversions and yearly and other rents, issues and profits, &c., and all the estate, right, &c., of the said *William Rolph* and *John Primer*, or either of them, of, in, to, or out of, such last-mentioned lands, &c., habendum to the use of the said *R. Close* in fee. The above conveyance contained only the usual covenants for title.

Close occupied this land for the first two or three years as a garden: *Rolph* continued to occupy the remainder of the field, and marked it out, and offered it for sale in lots for building; but only sold a lot to *Elderfield*, as after mentioned. Three or four years ago he put a board up, announcing that the land was on sale for building; the house not to be built in any particular form or plan.

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At the end of two or three years, *Close* contracted to sell his portion to one *Snelgrove*, who put up a cottage on the land. No conveyance was ever made to *Snelgrove*. The cottage so built was about fourteen feet from North to South, being built to the extremity of the land conveyed by *Rolph* to *Close* on the North side, and leaving a space of about eight feet on the South side, which was used as a passage, and was fenced off from the land in *Rolph's* occupation. There were *two small windows at the East end* of the cottage, and one at the West end.

Subsequently *Snelgrove* contracted with one *Elderfield* to sell him the property in question.

Elderfield, wishing to enlarge his cottage, applied to *Rolph* to grant him more land on the South side, which *Rolph* refused to do. But afterwards, by indentures of lease and release, dated respectively 11th and 12th of *September* 1822, between *Close* and *Martill* of the first part, *Snelgrove* of the second part, *Rolph* of the third part, *Elderfield* of the fourth part, and *William Wade* of the fifth part, reciting the feoffment of 15th *May* 1816, and that *Snelgrove* afterwards purchased the said piece of land, and had since erected thereon a cottage, and had then agreed to sell the said piece of land and cottage to *Elderfield*, and that *Close*, *Martill*, and *Rolph*, at the request of *Snelgrove*, had agreed to join in conveying the same to *Elderfield* as thereinafter mentioned; it was witnessed that, for the considerations therein mentioned, *Close*, *Martill*, and *Rolph*, at the instance of *Snelgrove*, did, and each of them did, as to all their estates in the premises, grant, bargain, sell, alien, release, and confirm, and *Snelgrove* did ratify and confirm, to *Elderfield*, in fee, all that piece of land on the West side of *The Seven*

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Seven Acres, situate, &c., and also the cottage lately built thereon, which piece of land admeasures from North to South twenty-two feet, and from East to West one hundred *and twelve* feet, and was bounded on the North, East, and South by land of *Rolph*, and on the West *by Southampton Common*, and lately occupied by the said *Snelgrove*, together with all ways, paths, passages, waters, water-courses, lights, easements, profits and appurtenances to the said piece of land, cottage, hereditaments, and premises belonging; and the reversion, &c., habendum to *Elderfield* in fee, to the uses and upon the trusts therein declared: covenants for title.

Elderfield immediately commenced certain alterations in the cottage; and *Kent*, his architect, told *Rolph* what he was going to do. *Rolph* was often there while they were at work, and saw the alterations going on, but knew nothing of the plan. He knew they were going to build a wall adjoining the land to enlarge the house. The following alterations were made: — The land, formerly used as a passage on the South side, was taken in, and the cottage enlarged to the extremity of *Elderfield*'s land on this side. *One small window was inserted on the West side of the newly built part*; and, on the East side, *a projection, terminated by bow windows, was carried out about five feet and a half. The bow windows do not occupy the places of the old windows.* (The relative positions of the old and new windows and walls were delineated in a plan, to be taken as part of the case. It appeared that the bow windows were in the direction of the former windows at the East end, but not in the same place: and, in the judgment, (pp. 190, 191. post), the Court assumed that the only change made in the East end was by carrying out the side walls five feet,

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and converting the termination into a bow.) Part of the footings of the exterior of the new South side were built on *Rolph*'s land. *Kent* spoke to *Rolph* about the footings after the wall was built: *Rolph* consented to their remaining, on condition that, if he built, he should be at liberty to build up to the South wall of the cottage. Two new windows were put in on the Western side, one on the old part, *another on the new:* the old windows were altered by putting in new mouldings. After this was done, *Kent* applied to *Rolph* for leave to put up a cornice spout, projecting over his land from the Southern wall, which *Rolph* consented to, on condition that he should be at liberty to remove it when he liked, and build home to the wall.

Elderfield occupied the cottage in its altered state, without any interruption, until 1828, when he let it to one *Cobb*. *Rolph* continued to occupy the adjoining land; and, on the application of *Cobb*, who then occupied the cottage as altered by *Elderfield*, and who wished to make a further addition to it on the North side, *Rolph*, by indenture of 1st of *June* 1828, between himself and *Cobb*, for the considerations therein mentioned, demised to *Cobb*, his executors, &c., all that piece of land situate, &c., adjoining the dwelling-house of the said *Cobb* on the North, and containing in depth from West to East, fifty-five feet four inches, and in breadth from North to South, fourteen feet nine inches, bounded on the West by the public road leading from *Southampton* over the common to *Portswood*, on the South by *Cobb*'s dwelling-house, and on the North and East by the land of *Rolph*, and on which said piece of land the said *Cobb* had begun to erect a chaise-house and stable; together with all and singular the easements,

ments, privileges, and appurtenances, to the said piece of land belonging, or in any wise appertaining, for the term of twenty-one years.

By indenture of 28th *November* 1828, *Cobb* assigned the last mentioned premises to one *Burden*; who, by indenture of 30th *August* 1831, assigned the same to the plaintiff, who occupied the remainder of the premises as tenant from year to year, under *Elderfield*.

In 1829 *Rolph* built a new house on that part of his land which adjoined the south side of the cottage and premises occupied by the plaintiff. Up to that time the field had been used principally for arable land; a wall, belonging to the plaintiff, about four feet high, dividing the two properties.

By indentures of lease and release, dated respectively 14th and 15th *February* 1832, between *John Knowlys* of the first part, *Mary Jefferies* of the second part, the said *W. Rolph* of the third part, and the defendant, *Caroline Bridges*, of the fourth part, — (reciting, inter alia, certain indentures of lease and release, of 7th and 8th *December* 1812, between *William Slade Wakeford* of the first part, *Joseph Tomkins* of the second part, the said *W. Rolph* of the third part, and *John Primer* of the fourth part; and reciting certain other indentures of lease and release of 11th and 12th *March* 1825, between *James Jarvis* and *Edward Stow* of the first part, the said *W. Rolph* of the second part, and *Nicholas Jardin* of the third part; and reciting also a certain other indenture of 24th *June* 1829, between the said *W. Rolph* of the one part, and the said *M. Jefferies* of the other part), — for the considerations therein mentioned, the said *J. Knowlys* and *M. Jefferies*, at the request and

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by the appointment of the said *W. Rolph*, and the said *W. Rolph*, did, and each of them did, according to their several and respective interests and estates in the premises thereby conveyed, grant, bargain, sell, aliene, release, and confirm, unto the said *Caroline Bridges*, in her actual possession &c., all that newly-erected messuage or dwelling-house, with the stables and ground in front, and the garden behind the same; the boundaries of such garden being in a strait line, from the South or adjoining wall of premises belonging to Mr. *Blanchard*, to &c. (here the situation and admeasurements of the land granted were set out), bounded, in part, on the North by premises belonging to Mr. *Blanchard*, and on the remaining part by land belonging to the said *W. Rolph*, on the East &c. — (the conveyance also mentioned that the site of the said dwelling-house, &c., and the ground thereby conveyed, were taken out, and lately formed part, of the said piece of land lately called or known by the name of *The Seven Acres*, comprised in and conveyed by the thereinbefore recited indentures of lease and release of 7th and 8th *December* 1812); — together with all houses, &c., trees, &c., ditches, &c., ways, &c., waters, watercourses, lights, easements, commons, &c., and other commonable rights, &c., and the reversion, &c., and all the estate, &c., and all the deeds, &c.; habendum to the said *Caroline Bridges*, in fee.

In 1832, there being some disagreement between the plaintiff and defendant, the latter erected, first a wooden fence, and afterwards a brick wall, parallel and close to the plaintiff's house, of the length of thirty-one feet, varying in height from fourteen feet six inches to eight feet eleven: it extends the whole length of the plaintiff's premises,

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premises, and its height, in the highest part, is within two feet of the eaves of the cottage (*a*). By the erection of this wall, the light coming to the rooms at the East side of the cottage is materially diminished, and the rooms are becoming damp.

The question stated was, whether the plaintiff was entitled to recover in this action. The Court was to be at liberty to draw conclusions, as a jury, from the facts stated.

(It was also added that the injury complained of related to the window inserted by *Elderfield* on the West side, after the conveyance of *September* 1823, and to the bow windows on the East side; and the injury to these windows was, for the purpose of the case, admitted.) This case was now argued (*b*) by

Sir *W. W. Follett* for the plaintiff. The defendant could not erect this wall unless *Rolph* could do so; and, although the windows were not twenty years old, *Rolph*, being the vendor, could not derogate from his own grant. In *Palmer* v. *Fletcher* (*c*) a man built a house on his own land, and then sold the house to one party and the adjoining land to another; and it was held that the vendee of the land could not, any more than the vendor, obstruct the lights of the house by putting piles of timber on the land, "for the lights are a necessary and essential part of the house." *Cox* v. *Matthews* (*d*) is to the same effect, both as to the vendor

(*a*) It appeared by the plan that the wall extended East and West, along all the South side of the plaintiff's cottage, and some feet beyond, at each end.

(*b*) Before *Patteson*, *Williams*, and *Coleridge* Js. Lord *Denman* C. J. was absent, being indisposed.

(*c*) 1 *Lev.* 122. (*d*) 1 *Vent.* 237, 239.

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of the house, and his assignee of the adjoining land; and so are *Compton* v. *Richards* (*a*), *Swansborough* v. *Coventry* (*b*), and *Coutts* v. *Gorham* (*c*). In *Riviere* v. *Bower* (*d*) the owner of a house divided it into two tenements, let one, and occupied the other; and it was held that the lessee could not obstruct the lights of the tenement in the landlord's occupation. It is true that, in the present case, the cottage was not built till after the conveyance, made in 1816, of the land on which it stood. But it appears by the case that *Rolph* sold the land for the purpose of its being built upon. Besides, in the conveyance of 1822, *Rolph* granted the cottage in fee to *Elderfield*, with all lights and easements appertaining. Then it will be said that the window at the West end was not made till after the conveyance of 1822, and that the bow windows at the East end did not then exist. But, the land being granted in order to be built upon, the alterations made while the adjoining land was in the vendor's possession are protected. Here, too, the window at the West end was made on the additional twelve feet granted for the purpose of the building; for it appears by the case that the grant in 1822 conveyed one hundred and twelve feet, from East to West, and the grant in 1816 was of one hundred feet only in that direction; and, in the conveyance of 1816, the Western boundary is described as a road twelve feet wide, next to *Southampton* Common; but, in that of 1822, the Western boundary is *Southampton* Common. Again, in 1828, after the alterations had taken place, *Rolph* conveys adjoining land on the North to *Cobb*, the then occupier of the

(*a*) 1 *Price*, 27. (*b*) 9 *Bing.* 305.
(*c*) *M.* & *M.* 396. (*d*) *R.* & *M.* 24.

cottage

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cottage so altered; and, in the conveyance, he describes *Cobb*'s cottage as the Southern boundary of the parcel then conveyed, thus recognising the cottage in its then state as enjoyed by *Cobb*. This is tantamount to a licence; and such a licence cannot be revoked; *Liggins* v. *Inge* (*a*), and the judgment of *Taunton* J. in *Bridges* v. *Blanchard* (*b*). This is not an easement requiring a grant, for the enjoyment takes place on the land of the vendee: but it is in the nature of an agreement that the grantee shall enjoy, according to the distinction taken by *Littledale* J. in *Moore* v. *Rawson* (*c*). Again, as to the bow windows on the Eastern side, the defendant is at any rate liable for obstructing so much of the light as was enjoyed by the original windows; *Chandler* v. *Thompson* (*d*). And *Rolph* sees the alterations already made without objecting. The Court, in the place of a jury, would here infer a licence, which may be shewn by circumstances, as well as an abandonment of the privilege, as in *Moore* v. *Rawson* (*e*). [*Coleridge* J. The vendor might perhaps be supposed here to have said, you may have your window till it is inconvenient to me.] That supposition cannot be adopted, where there is nothing to determine the particular plan of the house, but only a general assent to alterations.

Smirke, contrà. The cottage has been built since the conveyance by *Rolph*. This prevents the applicability of *Palmer* v. *Fletcher* (*g*), *Cox* v. *Matthews* (*h*), *Compton*

(*a*) 7 *Bing.* 682.
(*b*) 1 *A. & E.* 551.
(*c*) 3 *B. & C.* 340, explained in *Bridges* v. *Blanchard*, 1 *A. & E.* 546.
(*d*) 3 *Campb.* 80.
(*e*) 3 *B. & C.* 332.
(*g*) 1 *Lev.* 122.
(*h*) 1 *Vent.* 237, 239.

v. *Richards*,

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v. *Richards* (*a*), *Swansborough* v. *Coventry* (*b*), and *Coutts* v. *Gorham* (*c*). In these cases, the grant was of the houses with the windows then existing, or apparently in the progress of being built. *Riviere* v. *Bower* (*d*) merely shews that a tenant cannot add to his house a projection obstructing his landlord's lights. But then it is said, that the land here was sold in order that it might be built upon. The case rather shews that such purpose was abandoned. And, supposing the fact were so, it is impossible to sustain the argument on the other side, which amounts to this: — that, if a party sell land to be built upon, retaining the adjoining land, whatever erections or alterations the vendee at any time chooses to make, the vendor may not build so as to obstruct them. If this were so, the vendor must abstain from building on the adjoining land, not merely till the vendee has built the houses, but for ever. Even if it were admitted that the defendant could not so have built on his own land as to make the plaintiff's land unfit to be built upon, this would be very different from admitting that he could erect nothing which could, in the slightest degree, obstruct any windows that might be built. In *Swansborough* v. *Coventry* (*e*) it was contended that the vendor, by describing, in the conveyance, the boundary of the land conveyed as his own "building ground," had conveyed, subject, generally, to the erection of buildings by himself on such ground: but the Court would not attribute such an effect to the expression. As to the conveyance in 1822, it is true that *Rolph* is a party; but that is only to the extent of the twelve feet then

(*a*) 1 *Price*, 27.
(*b*) 9 *Bing.* 305.
(*c*) *M. & M.* 396.
(*d*) *R. & M.* 24.
(*e*) 9 *Bing.* 305.

added

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added to the land. Each party grants to the extent of his own interest: it cannot be said that *Rolph* would be estopped from disputing that he had title to the cottage; for there is no estoppel, the whole truth being disclosed by the recital, *Right dem. Jefferys* v. *Bucknell* (*a*), and an interest passing (*b*). "Although the words of a grant be general, yet, where it appears by the deed that the grantor had a limited interest, the grant will be construed as co-extensive with and limited by the right of the grantor," per *Bayley* J. in *The Earl of Portmore* v. *Bunn* (*c*). But, moreover, the windows to which the complaint applies have all been made since this deed was executed. It does not appear by the case that the window at the West end was on the part granted in 1822: the coincidence in the number of feet is accidental; the new part could not be the road in the common; and the plan shews that this was not so (*d*). And the bow windows at the East end are not even in the position of the windows which existed in 1822. They have not, therefore, the privilege of the former windows; *Cherrington* v. *Abney* (*e*), cited in *Comyns's Digest, Action upon the Case for a Nuisance* (C). There is no pretence for inferring a licence by *Rolph*; he merely abstained from interfering. In *Bridges* v. *Blanchard* (*g*) it was held that a much stronger act fell short of a licence. If such conduct were construed to amount to a licence,

(*a*) 2 *B.* & *Ad.* 281. And see the authorities in *The Earl of Scarborough* v. *Doe dem. Savile*, 3 *A.* & *E.* 918.

(*b*) *Co. Lit.* 45. *a.* (*c*) 1 *B.* & *C.* 700.

(*d*) It appeared by the plan that the additional part did not extend over the road described in the deed of 1816.

(*e*) 2 *Vern.* 646. See note (2) to the 3d edition. See *Garrit* v. *Sharp*, 3 *A.* & *E.* 325.

(*g*) 1 *A.* & *E.* 536.

the

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the rule requiring twenty years' enjoyment to give an indefeasible right to windows would be unmeaning; and so would stat. 2 & 3 *W.* 4. *c.* 71. *s.* 3. *Rolph* had no power to prevent the construction of the windows. That which passed between *Kent* and *Rolph* shews the reverse of an irrevocable licence. But, again, this would be a grant of an easement, not a licence. A licence is an authority to commit a trespass. But here the windows are erected on the land *of the grantee;* and then the plaintiff has to make out a grant by the owner of the adjoining land, that the light and air shall pass unobstructed, so far as regards the land *of the grantor*, to the house of the grantee. That is an easement, as much as the passage of water; and therefore a grant under seal is requisite. For this, it is sufficient to refer to the authorities cited in *Bridges* v. *Blanchard* (*a*). This privilege is called an easement in *Aldred's Case* (*b*), *Barker* v. *Richardson* (*c*), *Cánham* v. *Fisk* (*d*). *Bracton* (*e*) treats easements as answering to the servitudes of the civil law. Now among the prædiorum urbendorum servitutes are, "ne altius quis tollat ædes suas, ne luminibus vicini officiat" (*g*).

Sir *W. W. Follett* in reply. The licence is insisted on, as a matter, not of grant, but of contract, which may be by parol. It is true that, if a house be granted, nothing is privileged against the grantor but the house in its then state. But, if ground be let for building generally, there is an implied contract not to disturb the

(*a*) 1 *A.* & *E.* 540—543.
(*b*) 9 *Rep.* 58 *b.*
(*c*) 4 *B.* & *Ald.* 582.
(*d*) 2 *C.* & *J.* 128. 2 *Tyrwh.* 157.
(*e*) Lib. 4. c. 37. fol. 220 *b.* &c.
(*g*) Inst. II. tit. 3. s. 1. Dig. VIII. tit. 2. s. 2. *Pothier's Pand. Just.* vol. 1. p. 364, 365.

enjoyment

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enjoyment of the building to be erected; and the Court, here made judges of the fact, will infer that the land was so granted. [*Patteson* J. I doubt whether we can receive parol evidence to explain the intention of the conveyance.] It is not offered for the purpose of varying the terms of the conveyance, or adding to them. Again, there is the subsequent acquiescence. Even if the parol evidence of *Rolph*'s knowledge be insufficient, the deed of 1822 is an acquiescence by *Rolph*, under seal, that the land should be used for building. But such parol evidence appears to be matter whence a jury may presume the licence; *Doe dem. Sheppard* v. *Allen* (*a*), *Doe dem. Foley* v. *Wilson* (*b*). Then, in 1828, *Rolph* recognised the house, as it then stood with the windows now in question, as a boundary. He could not, after that, obstruct the windows. [*Coleridge* J. What was he to do? was he to describe the boundary with a protest?] It is a question for the Court, in the place of a jury, whether he meant to licence the unobstructed enjoyment of the house as it then stood. But the new windows, independently of such licence as this, were entitled to some part of the privilege of the windows for which they were substituted. If these were taken down, and the old ones replaced, it could not be said that the windows so replaced had lost their privilege. [*Patteson* J. They would not be the old windows. If you may alter at all, I do not see where you are to stop.]

Cur. adv. vult.

PATTESON J., in this term (*November* 25th), delivered the judgment of the Court.

(*a*) 3 *Taunt.* 78. (*b*) 11 *East*, 56.

This

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This was a special case argued before my Brothers *Williams* and *Coleridge*, and myself. The action was for darkening certain windows, and otherwise injuring the house of the plaintiff; and the material facts on which our judgment proceeds are the following. (His Lordship here recapitulated them.)

The right to maintain the present action was rested, in the argument, on two grounds: first, upon the principle that no man shall derogate from his own grant; in considering which it was rightly assumed that the defendant stood in precisely the same situation as *Rolph*; and, secondly, that from the grants above stated, coupled with certain acts to be mentioned hereafter, a licence or covenant for the unobstructed access of light and air through the windows in question was to be presumed; and that such licence or covenant was, in law, either irrevocable or absolute, or determinable only under conditions of fact which had not been performed.

That the plaintiff's argument should have its full weight, it was obviously necessary to contend that no distinction is to be made between the windows in the cottage, when first built, and the windows now in question, as no grant has been made by *Rolph* to those under whom the plaintiff claims since the formation of the present windows, except the lease of 1828. But we are of opinion that this point cannot be successfully contended. With respect to the Western window, the part of the house in which it is placed had no existence till after the conveyance of 1822; the land on which the structure was afterwards raised had, up to that time, been used only as a passage. As to the windows at the East, the case finds that they do not occupy the places of the old windows; the wall, in which those windows were,

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were, no longer exists: and, assuming that no greater change of position has been made than is necessarily consequent upon a carrying out of the side walls five feet, and converting the termination into a bow, such a change is, in our opinion, sufficient to prevent their being clothed with the same rights as the former windows. In whatever way precisely the right to enjoy the unobstructed access of light and air from adjoining land may be acquired (a question of admitted nicety), still the act of the owner of such land, from which the right flows, must have reference to the state of things at the time when it is supposed to have taken place; and, as the act of the one is inferred from the enjoyment of the other owner, it must, in reason, be measured by that enjoyment. The consent, therefore, cannot fairly be extended beyond the access of light and air through the same aperture (or one of the same dimensions and in the same position), which existed at the time when such consent is supposed to have been given. It appears to us that convenience and justice both require this limitation; if it were once admitted that a new window, varying in size, elevation, or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very unsatisfactory evidence. And, in the same case, a party, who had acquiesced in the existence of a window of a given size, elevation, or position, because it was felt to be no annoyance to him, might be thereby concluded as to some other window, to which he might have the greatest objection, and to which he would never have assented if it had come in question in the first instance.

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stance. The case of *Chandler* v. *Thompson* (*a*) is not at all inconsistent with this reasoning. There an ancient window had been enlarged; in the same place the original aperture remained: and the case only decided that *that aperture* remained privileged as before the enlargement. We do not forget that the windows in the present case, whatever their privilege may be, do not claim it as *ancient* windows in the ordinary way from an acquiescence of twenty years; but this circumstance furnishes no ground for any distinction as to the point now under consideration.

The inquiry, therefore, as to the first ground on which the plaintiff's case is rested, is limited to the effect of the lease of 1828; in considering which, we are not at liberty to attach any weight to the facts, that the conveyances of 1816 and 1822 proceeded from the same grantor. Now it seems a strong thing to contend that a lease for years of some feet of land on the North side of an existing dwelling-house, for the purpose of erecting a chaise-house and stables, will, in itself, prevent the lessor from making erections on the South side, by which the Eastern and Western windows may be darkened. Admitting, as we are disposed to do to the fullest extent, the principle that no man shall be allowed to derogate from his own grant, the only grant here is the lease; and it would be extending the principle to very indirect and remote consequences to consider the act in question as derogating from that grant.

But it is said, secondly, that the several grants by *Rolph*, coupled with his acts and declarations, amount

(*a*) 3 *Campb.* 80.

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to a licence or covenant, that the light and air should have free access to the house through the present as well as the former windows. In considering these, it is proper to go back to the commencement; but we are not at liberty to attach any weight to the statement that *Rolph* desired to sell in building lots, by which it is sought to give a character to the grant of 1816, which, on its face, it will not bear. Unless we are allowed to alter the terms of the contract by the introduction of previous wishes or intentions, we must regard it as a mere conveyance of arable land; and there is no doubt that, at any time previous to the erection of the cottage by *Snelgrove*, *Rolph* was at liberty to erect any buildings or walls on the residue of the field, which were not prejudicial to the occupation of the parcel granted away as arable land. Nor would the erection of the cottage make any difference in his rights; because, as to this cottage, *Snelgrove* did not claim under him; the land not having been granted for building purposes, the parties were, as to the cottage, strangers to each other; and no mere acquiescence for a shorter period than twenty years would have precluded him from obstructing the windows.

It was contended, however, that the grant of 1822 altered the position of the parties, and confirmed the building use which had been previously made of the land. By the grant itself, nothing passed from *Rolph* but twelve feet of land, although, in the same deed, the cottage itself, with all its existing lights, is conveyed by *Close*. Subsequently to the grant, the alterations now in question were made; and it appears that, although *Rolph* was ignorant of the precise plan intended to be adopted, yet he was often on the spot during the pro-

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gress of the work, and had a general knowledge of the nature of the alterations: he appears to have made no objections, but, at the same time, to have specifically reserved to himself on two occasions the right to build close up to the Southern wall.

Upon the evidence of these facts, the Court, which, by the agreement of the parties, is to draw any conclusion which a jury ought to have drawn, is desired to infer that the windows now in existence were placed in their present position with such an acquiescence or consent on the part of *Rolph*, as warrants the presumption of whatever legal instrument may be necessary to convert the plaintiff's parcel into a dominant, the defendant's into a servient tenement, in respect of these lights. Before, however, the Court will feel warranted in such a presumption, it must consider what right or power *Rolph* had to prevent the throwing out of these windows. The fullest knowledge, with entire but mere acquiescence, cannot bind a party who has no means of resistance. There may appear to be some hardship in holding that the owner of a close who has stood by, without notice or remonstrance, while his neighbour has incurred great expense in building upon his own adjoining land, should be at liberty, by subsequent erections, to darken the windows, and so destroy the comfort of such buildings. Yet there can be no doubt of his right to do so at any time before the expiration of twenty years from their erection; and this with good reason; for it is far more just and convenient that the party, who seeks to add to the enjoyment of his own land by any thing in the nature of an easement upon his neighbour's land, should first secure the right to it by some unambiguous and well understood grant of it

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from the owner of that land, who thereby knows the nature and extent of his grant, and has a power to withhold it, or to grant it on such terms as he may think fit to impose, than that such right should be acquired gradually as it were, and almost without the cognisance of the grantor, in so uncertain a manner as to create infinite and puzzling questions of fact to be decided, as we daily see, by litigation.

If a party, who has neglected to secure to himself rights so important by previous express licence or covenant, relies for his title to them upon any thing short of an acquiescence for twenty years, we think the onus lies upon him of producing such evidence as leads *clearly and conclusively* to the inference of a licence or covenant. It is difficult, perhaps impossible, to define the necessary amount of such evidence; but we are of opinion that the amount in the present case is clearly insufficient.

This disposes of the action as regards the windows.

With respect to the injury alleged to be occasioned by the building of the wall to the body of the house, it is sufficient to say that, when that part of the house was built, and encroached on *Rolph*'s land, it was stipulated that he should be at liberty at any future time to build close up to the wall in question.

Upon the whole, therefore, there must be judgment for the defendant.

Judgment for the defendant.

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A pauper, born in *M.*, in *England*, not having done any act to gain a settlement in her own right, and being the daughter of *Irish* parents who had gained no settlement in *England*, was, at the age of eighteen, delivered of a bastard, in her father's house in *S.*, in *England*, where she resided as part of his family. The mother of the pauper having applied to *S.* for relief for the pauper and her bastard only:

Held that, under stat. 3 & 4 *W.* 4. *c.* 40. *s.* 2., the pauper was removeable to *Ireland*, and not to *M.*; and that stat. 4 & 5 *W.* 4. *c.* 76. (assuming that it defines the age of emancipation to be sixteen, and prevents the head of a family from becoming chargeable by relief given to a child after that age) was not applicable, inasmuch as it extends only to *English* and *Welsh* poor.

ON appeal against an order of two justices, dated 21st *August* 1834, whereby *Ann Cotteral*, single woman, and her male bastard child, born on the 20th *August* 1834, were removed from the parish of *St. Leonard's, Shoreditch*, to the hamlet of *Mile End, Old Town* (both in the county of *Middlesex*), the Sessions confirmed the order, subject to the following case.

The pauper, *Ann Cotteral*, aged eighteen years, who has never done any act to gain a settlement in her own right, was born in wedlock in the hamlet of *Mile End, Old Town*, of *Irish* parents, who have not gained any settlement in *England*. On the 20th *August* 1834, the said *Ann Cotteral* was delivered of a male bastard child, in her father's house, in *Shoreditch* parish, with whom she continued to reside as part of his family, occasionally going out charing; and, on the 21st *August* 1834, application was made by her mother to the overseers of *Shoreditch*, for relief for the said *Ann Cotteral* and her bastard child only: on which, and after examining the mother of the pauper upon oath, an order was made by two justices, directing the said pauper, and her said male bastard child, to be removed to the hamlet of *Mile End, Old Town*, the place of her birth and alleged legal settlement.

The question for the decision of the Court was, whether, reference being had to 3 & 4 *W.* 4. *c.* 40. *s.* 2.,

and

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and stat. 4 & 5 *W.* 4. *c.* 76. *s.* 71., the pauper and her bastard child were settled in the hamlet of *Mile End, Old Town*. The case was now argued (*a*) by

Prendergast in support of the order of Sessions. In *Rex* v. *Whitehaven* (*b*) a pauper, who was born in *England* but had not otherwise any settlement there, and whose parents were *Irish*, having no settlement in *England*, was removed to her birth-parish; and, the Sessions having quashed the order, this Court quashed the order of Sessions. It is true that this was done on the ground that the pauper was not chargeable under stat. 59 *G.* 3. *c.* 12. *s.* 33.; but the case shews that the removal to the birth-parish was proper. The enactment in stat. 3 & 4 *W.* 4. *c.* 40. *s.* 2. is to the same effect as that in stat. 59 *G.* 3. *c.* 12. *s.* 33. But, even if *Rex* v. *Whitehaven* (*b*) were not to govern this case, the order must be supported. The objection, on the other side, is that the chargeability of an unemancipated female is chargeability of the parents, and that they and she must therefore be removed under stat. 3 & 4 *W.* 4. *c.* 40. *s.* 2. But *Ann Cotteral* was not relieved till she was eighteen years old; and now, by stat. 4 & 5 *W.* 4. *c.* 76. the age of emancipation is sixteen. Section 56. directs that relief on account of a child under the age of sixteen, shall be considered as given to the father: sect. 57. makes a man, who marries a woman having children, liable to maintain them till they attain the age of sixteen, or till the woman's death: sect. 71. makes illegitimate children follow the settlement of the mother till the age

(*a*) Before *Patteson*, *Williams*, and *Coleridge* Js. Lord *Denman* C. J. was absent, on account of indisposition.

(*b*) 5 *B.* & *Ald.* 720.

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of sixteen, or the acquisition of settlement in their own right, and binds the mother, while she is unmarried or a widow, to maintain them so long (or till the child's marriage, if a female), and makes the relief to them relief to the mother. Throughout the statute, sixteen is considered the age at which the child is to maintain itself. The enacting statute here, as elsewhere, has the effect of repealing previous enactments on the same subject. Thus sect. 56. provides that nothing therein contained shall discharge the father, grandfather, mother, and grandmother, from their liability under stat. 43 *Eliz.* *c.* 2. *s.* 7., which shews that, but for that proviso, the last-mentioned section would have been repealed by the enacting words of stat. 4 & 5 *W.* 4. *c.* 76. *s.* 56.; and it is, therefore, repealed, except so far as the proviso continues it. The Court will be averse to any construction extending the power of removal under stat. 3 & 4 *W.* 4. *c.* 40. *s.* 2. In *Rex* v. *Benett* (*a*) a very strict construction of the previous stat. 59 *G.* 3. *c.* 12. *s.* 33. was adopted: the Court holding that an *Irishwoman*, having no settlement here, might be removed, but not her illegitimate child, though within the age of nurture. So where an *Irishwoman* had, since the birth of a legitimate child in *England*, acquired a settlement in *England* by a second marriage, this Court held that the child was not removeable within stat. 59 *G.* 3. *c.* 12. *s.* 33.; *Rex* v. *Great Clacton* (*b*).

Thesiger and *Adolphus*, contrà. The question, independently of stat. 4 & 5 *W.* 4. *c.* 76., is, whether the pauper had any settlement in *England*. Now,

(*a*) 2 *B.* & *Ad.* 712. (*b*) 3 *B.* & *Ald.* 410.

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under stat. 59 *G.* 3. *c.* 12. *s.* 33., it was held that a woman, whose maiden settlement was in *England*, and who married a *Scotchman* not settled in *England*, must be removed with him and with their children, who had gained no settlement in their own right, to *Scotland*, and not to her own maiden settlement; *Rex* v. *Leeds* (*a*); where *Holroyd* J. said, "It seems to me, that it is altogether immaterial, provided the head of the family be born in *Scotland*, whether the children be born in *England* or not. The only exception is as to those children who have gained settlements in *England* in their own right." That case was not cited in *Rex* v. *Whitehaven* (*b*), where, indeed, the attention of the Court was principally directed to the nature of the chargeability, and not to the question of the child's settlement in *England*. *Rex* v. *Great Clacton* (*c*) was decided before *Rex* v. *Leeds* (*a*); and the decision turned on the mother not being removeable, so that the child was said not to be brought within the act at all; and the question whether the child had acquired a settlement was not noticed. As to *Rex* v. *Benett* (*d*), as the law then stood, an illegitimate child made no part of the family, and was therefore not removable with the mother. Then, as to stat 4 & 5 *W.* 4. *c.* 76., that act applies only to "the poor in *England* and *Wales*." Again, before that act, there was at all events much doubt how far relief to the grandchild was relief to the grandfather. In *Waltham* v. *Sparkes* (*e*) it seems to have been held that it was so; in *Rex* v. *St. Mary Westport* (*g*) (a certificate case), that it was not; and *Rex* v. *Framlingham* (*h*) is a similar case to the last (*i*). Then

(*a*) 4 *B.* & *Ald.* 198.
(*b*) 5 *B.* & *Ald.* 720.
(*c*) 3 *B.* & *Ald.* 410.
(*d*) 2 *B.* & *Ad.* 712.
(*e*) *Skin.* 556.
(*g*) 3 *T. R.* 44.
(*h*) *Burr. S. C.* 748.
(*i*) See *Rex* v. *Cornish*, 2 *B.* & *Ad.* 498.

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the intent of stat. 4 & 5 *W.* 4. *c.* 76. was, in this respect, not to determine how long a child should be part of a family, but to fix an age up to which the liability of the head of the family should continue, wherever and however the child was relieved. This is plainly the effect of the sections referred to on the other side. So, by sect. 58., relief given, under the rules &c. of the commissioners, to a pauper above twenty-one, or any part of his family under sixteen, is a loan to the pauper; and sect. 59. provides for the attachment of the pauper's wages in the case of a loan. The intention seems rather to provide for reimbursing the parish, than to define the age of emancipation. After the age of sixteen, stat. 43 *Eliz.* *c.* 2. operates as before. [*Coleridge* J. You say the intention of the legislature was, first, to clear up all doubts whether relief to the child, while under the age of sixteen, made the head of the family liable; secondly, to enforce the liability up to that age by special provisions: and you cite cases to shew that the doubt existed before the act. But afterwards you have to insist that the head of the family is liable, independently of the act.] An *Irishman* or *Scotchman* is so liable, because the previous act makes him removeable, with his family. It is not necessary, for the purpose of the present argument, to inquire what the effect of stat. 4 & 5 *W.* 4. *c.* 76. is with respect to children of *English* parents above the age of sixteen; though it rather seems that relief to them is not necessarily relief to the head of the family. [*Coleridge* J. Do you say that the relief to the child has a different effect, according as the parent is *English* or *Irish?* The statutes 59 *G.* 3. *c.* 12. *s.* 33. and 3 & 4 *W.* 4. *c.* 40. *s.* 2. did not in terms enact that relief to a child should make the parent chargeable;

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chargeable; they only authorized the removal if the person became chargeable "by himself or herself, or his or her family."] That shews, at all events, that a *Scotchman* or *Irishman* was chargeable through his children, and without limitation as to age. If stat. 4 & 5 *W.* 4. *c.* 76. should be held applicable, the illegitimate child of *Ann Cotteral* must follow the mother's settlement till sixteen: but the mother had no settlement at all, according to *Rex* v. *Leeds* (*a*).

Cur. adv. vult.

PATTESON J. afterwards in this term (*November* 25th) delivered the judgment of the Court.

The question in this case is, whether the removal of the pauper with her infant bastard child to the appellant hamlet can be sustained; and that depends upon this further (and principal) question, whether she ought not to have been removed with her father to *Ireland*, under the provisions of 3 & 4 *W.* 4. *c.* 40. *s.* 2.

The case states that the pauper was born in the appellant hamlet, of *Irish* parents, who have gained no settlement in *England*. They, therefore, are directly within the section of the act above referred to, if, at the time of this order made, the father had become chargeable to the parish of *St. Leonard's, Shoreditch*, provided the effect of it has not been altered by the subsequent statute of 4 & 5 *W.* 4. *c.* 76. And it seems to us, that the pauper's father was so chargeable at the time in question.

The language of the second section of the first mentioned act, with reference to this subject, is, "hath

(*a*) 4 *B.* & *Ald.* 498.

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actually become chargeable," "by himself or herself, or his or her *family*." Now the pauper was, at the time of her removal, living with her father as a part of his family, having done no act nor contracted any relation inconsistent with that character. Relief, therefore, to the pauper, under her father's roof, in the manner stated in the case, did render the father removeable to *Ireland*, and, as a consequence, the daughter also.

It is now to be considered how far the former act is affected by the latter, of 4 & 5 *W.* 4. *c.* 76. And it is, at once, observable that the object of the two statutes is perfectly distinct. The former is confined merely to making provisions for the removal of certain persons born in *Ireland*, *Scotland*, &c., who have gained no settlements in this country. No question, affecting the removal or settlement of persons born in *England*, is touched or alluded to, whereas the objects and provisions of the latter statute are purely and exclusively *English*. Various and important alterations are made in the law, respecting the giving of settlements, the duty of overseers, and the management of the poor, all of which are, of necessity, applicable and confined to *England*. It is observable, also, that the title of the act itself purports to concern *England* and *Wales*, and them only; nor do we perceive any regulation which has the slightest relation to *Ireland*, *Scotland*, &c., the places enumerated in the first-mentioned statute. We think, therefore, that the sound construction and interpretation of the two statutes is, to hold them to be, in effect and operation, as they are in object, wholly separate and distinct. This being so, we are of opinion that the provision in the fifty-sixth section of 4 & 5 *W.* 4. *c.* 76.,

as

as to the age up to which the parent is to be deemed answerable for relief given to a child, viz. sixteen (whatever might have been its effect upon relief given to a child above that age, as to the chargeability of the parent, if the parties had been *English*, on which we give no opinion), does not apply to the present case, depending, as it has been already stated it does, on stat. 3 & 4 *W.* 4. *c.* 40. *s.* 2.

We think, therefore, that the character of the daughter's residence with the father, and his liability to maintain her, and to be considered chargeable by relief given to her, are to be considered as they would have been if the latter act had not passed.

It is true that, in the case of *Rex* v. *Whitehaven* (*a*), the sessions had quashed an order of justices removing an *Irishwoman*, pregnant, and living with her parents unemancipated, to her birth settlement, upon the ground (as appears by the case) that she ought to have been sent with her parents by a pass to *Ireland*, under stat. 59 *G.* 3. *c.* 12. *s.* 33., which has the same expressions, as to the chargeability of the father, as stat. 3 & 4 *W.* 4. *c.* 40. *s.* 2.; viz. "become chargeable," "by himself or herself, or his or her family." And this Court quashed the order of sessions upon, as it seems, but little discussion, and with not very much consideration. Upon that case two things are to be observed: first, that the question, how far the woman, circumstanced as she was, could gain a settlement by birth, was not noticed *at all*; whereas in the case of *Rex* v. *Leeds* (*b*) that question was considered, and it was held that birth, in such case, gave no set-

(*a*) 5 *B.* & *Ald.* 720.

(*b*) 4 *B.* & *Ald.* 498. It was said in argument there, but not stated in the case, that the children had birth settlements in *England*.

tlement;

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tlement; next, that the decision proceeds expressly upon the ground that, under stat. 59 *G.* 3. *c.* 12. *s.* 33., the chargeability, contemplated by the statute, "was the actual asking for parish relief, and not the constructive chargeability" (of pregnancy) "created by 35 *G.* 3. *c.* 101. *s.* 6.;" upon which it may be sufficient to observe that the defect, upon which the Court held the decision of the sessions wrong, does not exist here. Relief in this case was *actually asked* for and given, before the order of removal was made.

It remains to add that, according to the authority of *Rex* v. *Benett* (*a*), the bastard in this case cannot be removed with the mother to *Ireland*. This, however, is not necessary for our decision, which is, that the removal of the pauper (which should have been to *Ireland*) to the appellant hamlet is wrong; and that, therefore, the order of removal, and the order of sessions confirming the same, must be quashed.

Order of sessions quashed.

(*a*) 2 *B.* & *Ad.* 712.

The KING *against* The Inhabitants of WOOLPIT.

Saturday, Nov. 14th.

ON appeal against an order of two justices, whereby *Dennis Brown* and *Mary Ann* his wife were removed from the parish of *Woolpit* to the parish of *Haughly* (both in the county of *Suffolk*), the sessions quashed the order, subject to the opinion of this Court upon the following case.

The pauper's present wife, whose maiden name was *Mary Ann Pilbrow*, was pregnant by him before marriage. *M. A. Pilbrow* at that time lived at *Woolpit*, and the pauper in the workhouse of the incorporated hundred of *Stow*: the parish of *Haughly* is in the hundred of *Stow*, but the parish of *Woolpit* is not. *M. A. Pilbrow* charged the pauper with having gotten her with child; and, on the 21st of *October* 1833, he was apprehended by a constable of *Woolpit*, and, on the 22d, was taken by him before a magistrate, who on the same day committed him, for want of sureties, to the county gaol at *Bury St. Edmund's*. About the beginning of *November*, *Pilbrow*, the father of *M. A. Pilbrow*, became surety for the pauper, and the pauper returned immediately from *Bury* to *Woolpit*. On the pauper's coming to *Woolpit*, *Pilbrow* took lodgings for him at *Woolpit* with one *George Howe*, at terms agreed

On a case sent up by sessions, it was stated that the pauper, not being resident at the parish of *W.*, was charged by a woman living there with having gotten her with child, and was committed to the county jail at *B.* for want of sureties; that the woman's father became his surety, and took lodgings for him at *W.*, to which the pauper removed, and after residing there a week married the woman, became chargeable in about a week after his marriage, and was removed from *W.* to *H.* The lodgings were paid for by the woman's father. The case then stated that, on the hearing of the appeal against the order of removal, the respondents offered to prove that the pauper was settled in *H.*, but that "the sessions quashed the order, on the ground that the pauper had not come to inhabit in *W.* within the meaning of stat. 13 & 14 *Car.* 2."

Held, by *Patteson* and *Williams* Js., that, upon this statement, it sufficiently appeared to this Court that the pauper was removeable; and the order of sessions was quashed, and the case sent back to be reheard:

Absente Lord *Denman* C. J.; and dissentiente *Coleridge* J., on the ground that the sessions had negatived the existence of an intention within the statute, and were not necessarily wrong as to the fact.

upon

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upon between *Howe* and *Pilbrow*, and *Pilbrow* subsequently paid *Howe's* charge for the lodgings. The pauper, having resided about a week in the lodgings so procured for him, married the said *M. A. Pilbrow*, his present wife, on the 12th of *November*, at *Woolpit*. He continued to reside in the same lodgings, until he was removed on the 20th of *November* following, by the order of two justices, to *Haughly*. The pauper was relieved by the parish of *Woolpit* after his marriage; but there was no evidence that the parish had been put to any expense, either by his lodging or his marriage. The respondents offered to prove the pauper's settlement in *Haughly*; but the appellants insisted on resting their case upon the irremoveability of the pauper, on the ground that he had not come to inhabit in *Woolpit*. The sessions quashed the order, on the ground that the pauper had not come to inhabit in *Woolpit* within the meaning of stat. 13 & 14 *Car.* 2. *c.* 12.

B. Andrews and *Austin*, in support of the order of sessions. The case was not drawn by counsel: but the substantial question raised is, whether the justices were entitled to remove the paupers from *Woolpit*. If *Brown* did not come thither to settle or inhabit, he could not be removed (whether settled there or not), because the case is not within the words of stat. 13 & 14 *C.* 2. *c.* 12. *s.* 1., "coming so to settle," and "come to inhabit." Stat. 35 *G.* 3. *c.* 101. gave no new power of removal; per Lord *Tenterden* in *Rex* v. *St. Lawrence, Ludlow* (*a*). There it was held that a person, who, having met with an accident, was taken to

(*a*) 4 *B.* & *Ald.* 663. And see Lord *Ellenborough's* judgment in *Rex* v. *Alveley*, 3 *East*, 566.

a parish

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a parish and remained there to be cured, was not removeable thence within stat. 13 & 14 *C.* 2. *c.* 12. *s.* 1., though chargeable. The same point had been ruled in *Rex* v. *St. James in Bury St. Edmunds* (*a*), where the pauper met with the accident in the parish, Lord *Ellenborough* saying that he had not come *animo morandi*. [*Patteson* J. This case is more like *Rex* v. *Chediston* (*b*).] There the question was one, not simply of irremoveability, but of actual settlement, by occupation of a tenement as tenant at will: there is nothing of the kind here. *Brown* merely goes to a house provided by his surety, who is also the father of the woman whom he is going to marry. [*Coleridge* J. Is it not a question of fact, for what purpose *Brown* came to *Woolpit?*] It is so; and the sessions have expressly decided it in the negative, which constitutes another distinction from *Rex* v. *Chediston* (*b*). And their decision appears to be right: the object was probably to keep out of the parish of *Haughly;* and the facts are something like those in *Rex* v. *Ashton-under-Lyne* (*c*), where Lord *Ellenborough* said that the attempt was to establish "a new head of settlement *latitando*."

Byles and *J. W. Smith*, contrà. The case confines the decision of the sessions to the point of law: the order is quashed on the ground, not that the pauper had not come to inhabit in fact, but that he had not come to inhabit "within the meaning of the statute 13 & 14 *C.* 2. *c.* 12." The sessions find the facts which constitute the inhabitancy, expressly; and, even if they were supposed to have meant to negative the intention to settle or inhabit, that would be inconsistent with the

(*a*) 10 *East*, 25. (*b*) 4 *B.* & *C.* 230.
(*c*) 4 *M.* & *S.* 357.

facts

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facts actually found. For they find an actual coming, and an actual inhabitancy. On stated cases raising questions of settlement by hiring and service, the Court, although the sessions have sustained the settlement, examine whether the facts legally constitute it, the question becoming a mixed one of law and fact. The finding of sessions was not considered to preclude discussion in *Rex* v. *Birmingham* (*a*), *Rex* v. *St. Lawrence Ludlow* (*b*), or *Rex* v. *St. James in Bury St. Edmunds* (*c*). The only question here is, whether the sessions were right in the conclusion of law which they profess to have drawn from the facts stated by them. Now the meaning of "settled," in stat. 13 & 14 *C.* 2. *c.* 12. *s.* 1., may be explained by the directions, in the same section, as to removal: the pauper is to be removed to the parish where he was last legally settled, "either as a native, householder, *sojourner*, apprentice or servant." A sojourning is a temporary residence: the word was inserted in opposition to final residence. This was a sojourning, supposing it to have been only with the temporary purpose of marrying in *Woolpit*. In *Rex* v. *Helsham* (*d*) Lord *Tenterden* said, "There is no authority to shew that the original intent of the party must be absolute and unqualified to continue for forty days." As to the suggestion, that this was a contrivance to keep out of *Haughly*, such a fact must be expressly found; per Lord *Kenyon*, in *Rex* v. *Fillongley* (*e*). The cases cited on the other side are distinguishable by the circumstance that in none of them the pauper came with any *animus morandi*, even for the shortest time.

(*a*) 14 *East*, 251.
(*b*) 4 *B.* & *Ald.* 660.
(*c*) 10 *East*, 25.
(*d*) 2 *B.* & *Ad.* 625.
(*e*) 2 *T. R.* 711.

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PATTESON J. (*a*) We are not agreed on the question whether the Court is here concluded as to the fact. If we are, we have nothing to do with the case, and then it was absurd to send it to us. No doubt, however, such cases are sometimes sent. Yet, if we see that the finding in the case is perfectly contradictory, and if in reality the facts proved shew that *Brown* did come to *Woolpit* to settle, but the sessions mean to find that he did not in law so come, and wrongly refer it to us as a matter of law, then I think the Court can take cognisance of the question, especially if the order of sessions be contrary to the tenor of the authorities. They find, in words, that *Brown* was resident in the workhouse of the hundred of *Stow*, in which the appellant parish is situated; he is then taken before a magistrate and committed for want of sureties; he gets a surety, who is the father of the woman upon whose charge he was committed. Then the sessions find that he returned to *Woolpit*. *Brown* did not, in the proper sense of the word, *return* to *Woolpit*, for he had not been there before: he therefore *came* to *Woolpit*, and that of his own accord. The lodgings, it is true, were taken for him without his own interference: still he comes and resides. If so, what did he come to do, except to reside? I cannot see a doubt. In *Rex* v. *Helsham* (*b*) Lord *Tenterden* said that it was not necessary that there should be "a permanent intent," under stat. 13 & 14 *C.* 2. *c.* 12. *s.* 1., the recital contemplating quite the contrary. The statute therefore applies to temporary residence. I go the length of saying that, as it strikes me at present, if any man come for the pur-

(*a*) Lord *Denman* C. J. was absent, owing to indisposition.

(*b*) 2 *B.* & *Ad.* 625.

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pose of inhabiting at all (provided it be not under such circumstances as those in *Rex* v. *St. James in Bury St. Edmunds* (*a*), and *Rex* v. *St. Lawrence, Ludlow* (*b*), where the persons were detained by accidents), it is sufficient. The act says "come to inhabit." I do not say that that is sufficient to give a settlement, which depends on other requisites, such as renting a tenement, hiring and service, and so on. There must indeed be *animus morandi*: I do not say that merely coming as a guest will bring the case within stat. 13 & 14 *C.* 2. *c.* 12. *s.* 1. The sessions might have found that to be the fact here; but they have not, and nothing which is found shews that it was so; on the contrary, they have stated what distinctly shews to my mind a purpose of residing. *Rex* v. *St. James in Bury St. Edmunds* (*a*) has nothing to do with this case: the remaining was not voluntary there. *Rex* v. *Birmingham* (*c*) is remarked upon by *Abbott* C. J., in *Rex* v. *St. Lawrence, Ludlow* (*b*), where he says that, if that case were at variance with *Rex* v. *St. James in Bury St. Edmunds* (*a*), he should adhere to the latter. But, without entering into the question of the authority of *Rex* v. *Birmingham* (*c*), the present case differs from it; there the pauper had been sent from one parish to another, and was deterred, against her will, from quitting that in which she was; yet she was held removeable from it. The present case is certainly stronger, for the pauper came of his own accord. Now, without saying that I would go the whole length of the decision in *Rex* v. *Birmingham* (*c*), it is a strong authority for saying that here the pauper came to settle. Therefore the only question is, whether we are con-

(*a*) 10 *East*, 25. (*b*) 4 *B.* & *Ald.* 660.
(*c*) 14 *East*, 251.

cluded

cluded as to the fact. I think not. I say that it is actually found that the pauper came to settle; and that the sessions, in afterwards finding that he did not, meant to raise the point of law.

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WILLIAMS J. I am of the same opinion. Of what utility it might have been, if this Court had always required that facts should be found for them, I do not say: it is infinitely too late to do so now. The books are full of cases in which this Court has examined facts. What is more a fact than fraud? Yet the sessions have found fraud, and this Court has reversed the finding. What more than occupation, with reference to rating? Yet that has been examined by this Court. What more than questions of dispensation and dissolution in cases of hiring and service? Those have been over and over again examined by this Court, and the finding of the sessions corrected. So long ago as the time of Lord *Hardwicke*, in a question as to circumstantial proof of fraud, he said (*a*), "the justices are judges of the fact: and they may judge of the fraud arising from the facts: but we are judges of the law upon the facts, though not of the facts themselves. If they had generally found the fraud, we might have been bound by such a general finding: but when they state the facts particularly, the matter is as much open for our determination upon it, as it was for theirs." And, accordingly, the Court there entered into the question of fraud, and found contrary to the finding of the sessions. Cases are abundant in which this Court has decided on

(*a*) *Rex* v. *Tedford*, *Bur. Set. C.* 60.

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the fact of occupation. Thus, in *Rex* v. *St. Mary the Less, Durham* (*a*), the facts were ambiguous, and the sessions found that there was no occupation, and *Law* and *Chambre* relied on this as conclusive; but, as the sessions had stated the facts upon which their decision was grounded, Lord *Kenyon* answered, "that is the very question which they have left for the decision of this Court." Here, also, it is plain what the question is which the sessions have submitted to us. It is merely whether, upon the facts stated by them, the pauper was removeable in law. They might have acted on their own impression; they were not compelled to state a case: but they have done so. We therefore are bound to come to a decision. As to that decision, I can entertain no doubt. The meaning of stat. 13 & 14 *C.* 2. *c.* 12. *s.* 1. is, not that a party must come to settle under circumstances which would constitute a settlement if the time were long enough, but that he must come to inhabit. Then what is the limit? Is it to be a week or a fortnight? There can be none. Here there is nothing to restrict the intended residence. It is not stated that it was for a limited time, or that a removal to any other place was contemplated. The residence, therefore, was absolutely unrestrained; a circumstance which was negatived in the cases cited in support of the order of sessions. Thus in *Rex* v. *St. Lawrence, Ludlow* (*b*), the pauper never *came* to the parish: in *Rex* v. *Ashton-under-Lyne* (*c*) the deserter never came to reside, but merely to escape pursuit, without any pur-

(*a*) 4 *T. R.* 477. And see Lord *Kenyon*'s judgments in *Rex* v. *Field*, 5 *T. R.* 591., and *Rex* v. *Whittlebury*, 6 *T. R.* 466.

(*b*) 4 *B. & Ald.* 660. (*c*) 4 *M. & S.* 357.

pose

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pose of staying. On the whole facts here, the statement of the sessions leads inevitably to the conclusion, that the pauper came for a time not limited, and to settle within the meaning of the statute. As, therefore, they have made that statement, to shew the grounds of their decision, we are bound to say that we differ from it.

COLERIDGE J. It is with great regret that I dissent from the judgments which have been given. I am very probably wrong: but I am bound to express my opinion. We do not differ in principle. No doubt this Court has in many instances entered into matters of fact brought before it by settlement cases. Most lawyers regret this: I do not defend it: though the object of it has been to do justice. The Court, however, has taken upon it jurisdiction as to matters of fact; but as this is never done quite correctly, no one would wish to increase the number of instances. Therefore, on the question of fact, if distinct, the finding is not to be disturbed, except (and it is an exception founded on good sense) that the Court will always interfere with the finding of a jury, which is either unsupported by evidence or contrary to it. Facts are for the jury; yet it has now become the inveterate practice of the Court to interfere in such cases; and I hope that it always will be so. Then, in this particular case, is the question one of fact or law? I will not ask the meaning of the phrase "coming so to settle;" but clearly it has always been treated as a matter of fact. We may set out with this, then, that the question is one of fact: that is not controverted either at the bar or by my learned brothers. Then the only questions are, have the sessions decided on the fact? If so, have they submitted that conclusion of fact to us?

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Or, if they did not intend so to submit it, is it clearly wrong? When I look at the case, I cannot doubt (were it not that one of my learned brothers thinks otherwise) that, right or wrong, the sessions have found the fact. Although they state facts, and desire us to determine, yet I find the point taken, and the sessions saying that they act on the ground that the pauper had not come to inhabit within the meaning of the statute. The sessions, therefore, have drawn a conclusion. Then, is it without any foundation? A man living out of the parish, and being the putative father of a child with which a woman is pregnant, and the father of the woman having become surety for him, *comes* to the parish. That is ambiguous; he might come with any intention. He takes no house; but he lives in the house provided for him by the woman's father, marries in a week, and is relieved by the parish in about a week after. Then is it a necessary conclusion, that he came to settle or inhabit? It is said that, if he did not, something should be stated by way of negative. That I deny. The respondents are to justify the order; it is an affirmative fact that the pauper was removeable. They must prove the facts of chargeability and of the *animus residendi*. Then is the conclusion that he came to settle or inhabit necessary? I think many others might be drawn: I do not say that others should be drawn, though my own, perhaps, would be different from that of the sessions: but, compatibly with these facts, I might say that he did not come to settle or inhabit. The justices, therefore, are not necessarily wrong.

Now, as to one or two cases, *Rex* v. *Chediston* (*a*) seems

(*a*) 4 *B.* & *C.* 230.

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to me no authority here. When you once have a question of fact, the variety in the circumstances makes it unnecessary that the conclusion should be the same. The question there was, whether the party was an occupier, and it was held that he was so; and, no doubt, any sensible person must have drawn the same inference from the length of time. The question in the present case was never at issue there. As to *Rex* v. *Birmingham* (*a*), I fairly say that I think it is not an authority by which the Court ought to be governed. I think the intention there was too clear; and it seems, besides, that Lord *Ellenborough*'s attention was drawn to another point: he assumes that the pauper was removeable from either parish, and asks how the oscillation between the two parishes could affect the order of removal to her proper parish. I was much struck with Mr. *Smith*'s very able argument on the words of the statute. But I say that whoever reads the whole of the statute must see that a party is not removeable, unless he has come to do that by which he would obtain a legal right to some part of the stock of the parish. It is not enough that he should have been there eight or ten days, turning in his mind whether he should stay or not. The ground of my opinion is, that I think it most desirable that we should keep to our own jurisdiction, and compel the sessions to find the facts. I think they intended to do so here, and I cannot see that they are necessarily wrong.

PATTESON J. This order must be quashed; but the case must go down again to the sessions, the respond-

(*a*) 14 *East*, 251.

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ents not having been heard. If the sessions choose to go into the facts, they are not precluded.

COLERIDGE J. It is much to be regretted that it so often happens that sessions cases are not drawn by barristers.

Order of sessions quashed, and the case sent back to be reheard.

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Pauper's mother applied to *W.*, a carpet weaver, to take him into his employment. *W.* agreed with her to take pauper for two years on trial, after which, if *W.* and pauper agreed, he was to be apprenticed to *W.* He was to have board, lodging, and washing, but no stated wages, and he was "to draw." Every carpet weaver is at first taught "drawing."

ON appeal against an order for removing *Thomas Harman* and his wife from the borough of *Kidderminster* in *Worcestershire*, to the parish of *Great Wishford* in *Wiltshire*, the sessions confirmed the order, subject to the opinion of this Court upon the following case: —

The pauper's father, being settled in *Great Wishford*, died in 1818; and in 1823 the pauper's mother applied to *Samuel West*, a carpet weaver at *Kidderminster*, to take her son, the pauper, into his employment. *West* agreed with the mother to take the pauper for two years on trial, after which, if the pauper and master agreed, the pauper was to be apprenticed to *West*. The pauper

Pauper served above a year under this contract, in the borough of *K.* These facts being proved on appeal against an order removing pauper to *K.*, the chairman put it to the sessions, whether there had been a hiring and service, or a service under an imperfect contract of apprenticeship. They found the latter, but sent a case for the opinion of this Court, stating the facts as above:

Held, that this Court might, under these circumstances, review the judgment of the sessions.

But that the judgment was not to be disturbed, there being grounds for the finding.

And *semble*, that the finding was right, inasmuch as it might be collected from the case that the object of the parties was learning and teaching.

was

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was to be found in board and lodging and washing, by *West*, but was to have no wages, except what *West* pleased to give him as pocket money. The pauper was to draw. The pauper went to *West* as agreed, and worked for him about a year and a half, living in *West*'s house in the borough of *Kidderminster* during that period. The pauper then ran away from *Easter* to wheat harvest, when he returned and worked for *West* for a short time at weekly wages, when he again ran away and they parted. It was stated by a magistrate on the bench, and assented to, "that every carpet weaver is first taught the art of drawing as a draw boy." The chairman took the opinion of the Court, whether the service was an imperfect contract of apprenticeship, or a hiring and service, and the Court found that it was an imperfect contract of apprenticeship (*a*).

F. V. Lee (with whom was *M. Turner*), in support of the order of sessions. It may be admitted that the finding of the sessions is not conclusive, if the Court perceive, upon their statement, that the decision could not have been arrived at consistently with the facts. But the Court will not reverse the judgment of the sessions, if supported by circumstances, however slight. To contend that this case is analogous to that of a conditional hiring, would be begging the question, because in every such case the hiring has distinctly taken place; here, the question is, whether there was any hiring or not. In *Rex* v. *Helsham* (*b*), where the pauper entered upon a tenement, to live upon it a month on trial for nothing,

(*a*) It was stated, during the argument, that this case was not drawn by counsel.

(*b*) 2 *B.* & *Ad.* 620.

and,

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and, if he liked it on that trial, to take it at the rent of 14*l.* a year at *Martinmas*, the residence on trial was held to incorporate with the subsequent residence at a rent, for the purpose of giving a settlement: but there the taking on trial was in the first instance distinct; it was only on the event of the premises being liked, that the first holding and the holding at a rent became incorporated under one and the same contract. But in the present case there was never any distinct contract of hiring. The case finds that it is usual for every carpet weaver to be first taught the art of drawing as a draw-boy. The contract therefore was, that the pauper should go on trial as a draw-boy for two years, and afterwards, if approved of by the master, be bound apprentice. It is true that one fact is wanting here, which has influenced the Court in deciding such cases; no expression is used in the contract which directly implies teaching or learning. But the intention of the parties may be collected from other circumstances. In *Rex* v. *Edingale* (*a*) the master had refused to take the pauper as an apprentice; but, as it had been agreed that the pauper was to go to him to learn his trade, Lord *Tenterden* said, "that being the object of the parties, expressed at the time of making the agreement, I cannot distinguish this from the case of *Rex* v. *Combe* (*b*)." There the contract was held to be an imperfect contract of apprenticeship, and the object contemplated by the parties when making it was admitted to be a proper test of its nature. And in *Rex* v. *Edingale* (*a*) Lord *Tenterden*, speaking of the question whether the contract then before the Court was one of apprenticeship or of hiring and service, said, "if

(*a*) 10 *B.* & *C.* 739. (*b*) 8 *B.* & *C.* 82.

that

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that was a question of fact, as it may be, the sessions have decided it." [*Patteson* J. If the sessions have negatived a contract of hiring and service, it is sufficient for you, if that *can* be a right conclusion from the facts].

W. J. Alexander and *Whitmore* were then called upon by the Court. This is a case in which, upon the facts stated, it is clear that the judgment of the sessions ought not to be held conclusive, according to the doctrine laid down in *Rex* v. *Woolpit* (*a*), even by *Coleridge* J., who differed, as to the particular case, from the rest of the Court. The Justices at sessions had the alternative put to them, whether (as it is stated) "the service was an imperfect contract of apprenticeship, or a hiring and service." They have found the first, a conclusion which cannot be supported, but they have not expressly negatived the last; they have not, therefore, found that, if their opinion was wrong as to the contract of apprenticeship, there was not a hiring and service. On the contrary, as no third proposition appears to have been before them, they may be taken to have found that, if that part of the alternative to which they inclined was not true, the other was. They have at any rate left the matter in doubt: the whole is referred to the Court, and may be dealt with by them according to the facts, if those are clear, as was done in *Rex* v. *Tedford* (*b*), *Rex* v. *St. Margaret's, King's Lynn* (*c*), and *Rex* v. *Newtown* (*d*). Then, as to the question itself. *Rex* v. *Helsham* (*e*) is not in point, because there the trial proved

(*a*) Antè, p. 209—216.
(*b*) *Burr. S. C.* 57.
(*c*) 6 *B.* & *C.* 97.
(*d*) 1 *A.* & *E.* 238.
(*e*) 2 *B.* & *Ad.* 620.

satisfactory,

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satisfactory, the residence went on uninterruptedly, and one part of it became incorporated with the other. Here, in the first place, the contract was not an imperfect contract of apprenticeship. The criterion upon this subject is, whether the object of the parties, in their agreement, was teaching and learning, or service; *Rex* v. *Edingale* (*a*), *Rex* v. *Crediton* (*b*), *Rex* v. *Newtown* (*c*). Here the object was, not that the boy should learn, but that it should be ascertained whether or not he was capable of learning. There was no premium, no written instrument, and nothing expressly said of teaching and learning. The terms used were such as exclude the possibility of a present contract of apprenticeship being created. The arrangement for a future apprenticeship contradicts the supposition of a present one. That being so, the finding of the sessions on this point does not bind the Court; unless it can be contended that the finding would have been conclusive if the parties had actually drawn an agreement reciting that an apprenticeship was not contemplated. Secondly, there was a contract of hiring, and a service. Quoad service for two years, the contract was absolute; the apprenticeship was to depend on what took place during that period. The immediate intention is plain; the ulterior views are not to be looked at. [*Coleridge* J. Do you mean that, if at the end of a month he had been found unfit to learn carpet weaving, he was still to be a servant for two years?] The contract, by its terms, would subsist for two years. Even if the hiring was conditional, it continued for a year undefeated. The statement by a magistrate, that every carpet weaver is first taught drawing, does not

(*a*) 10 *B.* & *C.* 739. (*b*) 2 *B.* & *Ad.* 493.
(*c*) 1 *A.* & *E.* 238.

alter

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alter the case. Perhaps the boy had learned drawing already, when the agreement was made; or the learning might be incidental to the service. But there was an absolute contract to serve, and the boy worked under it for a year.

PATTESON J. (*a*) The chairman put it to the Court of quarter sessions, whether there was in this case an imperfect contract of apprenticeship, or a hiring and service. The sessions found the one, and I think that in doing so they negatived the other. It is now contended, first, that we are not at liberty to enter into the question, the sessions having decided on it; and, secondly, that, if we do enter into it, the judgment of the sessions is right. The line of demarcation is not plain between cases in which this Court is and is not bound by the finding of the sessions; but there is clearly no instance in which this Court has reversed their decision, unless they have manifestly come to a conclusion which was wrong, either as being unsupported by the facts, or as being contradictory to them. We have been pressed, in this case, with the decision in *Rex* v. *Woolpit* (*b*), but there my brother *Williams* and I thought the finding of the sessions contradictory to the facts appearing on the case: my brother *Coleridge* was of a different opinion. Here, we all think that the sessions came to a conclusion warranted by the facts. The contract might have received either of the two constructions submitted to the sessions, more especially as it was by word of mouth. In *Rex* v. *St. Mar-*

(*a*) Lord *Denman* C. J. was absent on account of illness.
(*b*) Antè, p. 205.

garet's

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garet's King's Lynn (*a*), *Bayley* J. said "Every case of this description must depend upon its own particular circumstances. If from all that passed between the parties at the time when the contract was made, they appear to have contemplated the relation of master and apprentice, then the contract must be considered to be one of apprenticeship; and, if it be an imperfect apprenticeship, no settlement can be gained by serving under it. If, on the other hand, it appears that the parties contemplated the relation of master and servant, then it must be deemed a contract of hiring, and a settlement will be gained by serving under it." The sessions are to determine upon a view of all the circumstances, as *Bailey* J. truly says, if the contract itself be ambiguous. In subsequent cases the criterion has been stated in rather different terms from those used by *Bayley* J., in *Rex* v. *St. Margaret's King's Lynn* (*a*). The test, as latterly stated, and as put in *Rex* v. *Crediton* (*b*), and *Rex* v. *Newtown* (*c*), is, whether or not the contract was for learning and teaching. Here it might have been inferred from the circumstances of the contract, either that the master was to take the pauper for two years, to see whether he was a teachable boy, and likely to learn the business; or that he was to take him for two years to do all kinds of work, and that, if liked at the end of that time, he was to be received as an apprentice. The sessions have adopted the first construction, and have found an imperfect contract of apprenticeship. My own inclination is towards the same conclusion, but I think the circumstances will admit of a contrary one. It is suggested that the sessions must

(*a*) 6 *B.* & *C.* 99.
(*b*) 2 *B.* & *Ad.* 493.
(*c*) 1 *A.* & *E.* 238.

have

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have doubted the justness of their own decision, or they would not have referred the matter to the Court as they have; but this is an argument which may always arise, if the sessions are to send cases at all. Upon the whole, I think that enough appears in this case to justify the order of sessions.

WILLIAMS J. I am also of opinion that there is, in this case, enough to support the order of sessions. The supposed difference of opinion in *Rex* v. *Woolpit* (*a*) arose merely from the different views taken of the facts of that case. Here, without saying whether I should or should not have decided as the sessions have, I think they had ground for finding that there was a contract to teach and learn (as I presume they mean to say), and not a contract of hiring. And if the case shows any ground for their decision, we ought to support it. The word "employment" might apply to either description of contract. It is true, the agreement here was not, in terms, that the boy should go to be taught; but it might be inferred that he was to go for that purpose: he was "to draw;" and that most probably was to prepare him for the particular business. One expression in the case, therefore, with respect to the contract, is ambiguous, and the others are in favour of the finding. I should have been sorry if the facts had proved so conclusive against the order of sessions, that we could not have maintained it; for the sessions appear to have acted upon the case of *Rex* v. *Crediton* (*b*), where this Court over-ruled a multitude of former cases (such as *Rex* v. *Little Bolton* (*c*), and *Rex* v. *Eccleston* (*d*)), which had created great con-

(*a*) Antè, p. 205.
(*b*) 2 *B.* & *Ad.* 493.
(*c*) *Cald.* 367.
(*d*) 2 *East*, 298.

fusion

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fusion by establishing, that a contract in which the servant was not expressly retained as an apprentice might not be a contract of apprenticeship, although there was no doubt that the intention of the parties was teaching and learning. Now, a more plain and intelligible ground has been laid upon which to decide such cases, namely, the object contemplated by the parties; and I am glad that the sessions in this instance appear to have proceeded on that ground.

COLERIDGE J. In *Rex* v. *Woolpit* (*a*) there was no difference on the Bench as to principle. Every one will agree that the jurisdiction, upon matters of fact, is in the sessions: this Court has it only when a matter of fact is referred to it by the sessions, or where they have decided on the fact without any evidence, or against evidence. The first question here is, whether the sessions have found a matter of fact. I think that, in effect, they have. Then, is their conclusion necessarily wrong? I think it is right, therefore I cannot say that their decision ought to be interfered with. An imperfect contract of apprenticeship exists, where the parties have had a perfect contract of apprenticeship in view, but it has not been thoroughly carried into execution. The object of such a contract is, that the master shall teach and the boy learn. That was contemplated here. The parties would not go to the expense of an indenture, but they said that they would try for two years whether the boy could learn and the master teach him; and, if it proved so, the boy was to be apprenticed. Then there was, in effect, an imperfect contract of apprenticeship. It is said that no express words signifying in-

(*a*) Antè, p. 205.

struction

struction were used; but I think that is not necessary, if it can be inferred that learning and teaching were contemplated. It would be a new position to lay down, that an intent cannot be collected in the absence of express terms.

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Order of sessions confirmed.

PEARCE *against* CHESLYN.

Tuesday, Nov. 17th.

REPLEVIN. The defendant avowed for rent arrear; and the plaintiff pleaded in bar non tenuit. On the trial before *Vaughan* J., at the last *Leicestershire* assizes, the defendant, to shew the holding, offered in evidence two papers. The first was entitled, "Memorandum of an agreement made and entered into the 29th day of *January* 1833, between *Richard Cheslyn*," [the defendant] "and *John Webberley*;" but, in effect, it amounted to a lease of the premises on which the distress was taken, at a larger rent than that distrained for, though in other respects on the terms set out in the avowry. The second was annexed to the preceding, and was as follows:—"*Langley Priory*, 16th *March* 1833. Memorandum of agreement. Whereas the within named *John Webberley* and *Richard Cheslyn*, having agreed to abandon the annexed contract for the taking and letting the farm and lands &c. therein named, called &c., we, *William Pearce*, of &c., and the said *Richard Cheslyn*, do agree, the former to take

By a paper entitled a memorandum of agreement, signed by plaintiff and defendant, it was recited that defendant and *W.* had agreed to abandon the annexed contract for taking and letting certain lands; that plaintiff and defendant agreed, the former to take, the latter to let, the lands, upon the conditions contained in the annexed contract; "the said rent to be annually paid by quarterly payments, and to be in amount 22*l.*; and we further bind ourselves to the other to execute a similar agreement to the one recited and referred to." This agreement had a 3*l.* stamp. The annexed agreement had no stamp, and was, in effect, a lease from the defendant to *W.* setting out regularly the terms of the tenancy, &c.

Held, that the stamped agreement incorporated the unstamped one, and that the two together might be given in evidence as a lease on the terms contained in the unstamped one.

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and become tenant, and the latter to let and to farm set, the therein farm of &c., upon the conditions, agreements, &c., contained in the same, dated 29th *January* 1833, between the said *John Webberley* and *Richard Cheslyn*, the said rent to be annually paid by quarterly payments, and to be in amount 220*l.*; and we further bind ourselves to the other to execute a similar agreement to the one recited and referred to." (Signed by the plaintiff and defendant.) The former instrument had no stamp; the latter had a stamp of 3*l.* The plaintiff's counsel objected that the former instrument could not be read for want of a stamp; and that the latter instrument did not amount to a demise. The learned Judge over-ruled the objection, and the defendant had a verdict. In this term (*Friday, November* 6th) (*a*),

G. T. White moved for a rule to shew cause why the verdict should not be set aside, and a new trial had. The agreement between the defendant and *Webberley* required a lease stamp, and, not having one, could not be read at all; and, if that be left out of the evidence, the second agreement cannot of itself shew the terms of the holding. [Lord *Denman* C. J. Suppose an instrument refer, for the terms of the holding, to the terms contained in a newspaper, or in the "Attorney's Pocket-book."] Here, the instrument containing the reference does not make a present demise. The parties are to execute an agreement similar to the original one. In *Poole* v. *Bentley* (*b*) an instrument containing such a clause was held to be

(*a*) Before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.
(*b*) 12 *East*, 168.

a lease;

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a lease; but in that case there was an additional clause, "This agreement to be considered binding till one fully prepared can be produced." In *Staniforth* v. *Fox* (*a*) the instrument, which was held to be a lease, contained words from which it was inferred that the relation of landlord and tenant was to commence immediately: here, nothing appears but the intention to create such a relation by a future instrument. In *Doe dem. Pearson* v. *Ries* (*b*) the Court called in aid the acts of the parties to explain the instrument: but here there was no evidence of the sort. And, besides, in that case, it appeared from the instrument that the party occupying the premises was to make an immediate outlay. [*Coleridge* J. The cases are collected in Mr. *Roscoe's Treatise on the Law of Actions relating to Real Property* (*c*)]. There will not be found one in which the agreement has been construed as a present demise, where there has been an absolute engagement for a future execution of a lease, and no hardship appeared to be thrown upon one or other of the parties, if the agreement were not so interpreted.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

The question here was, whether proper evidence was given of the demise. We think the agreement between the plaintiff and defendant incorporated the earlier one, and, with that incorporation, constituted a perfect lease on the terms of the earlier agreement. The instrument

(*a*) 7 *Bing.* 590. (*b*) 8 *Bing.* 178.

(*c*) Tit. *Ejectment*, p. 516—523. See *Warman* v. *Faithfull*, 5 *B.* & *Ad.* 1042.

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drawn up between the plaintiff and the defendant had a stamp sufficient for a lease: the objection, therefore, as to the want of stamp on the agreement to which it referred, seems to us unfounded.

Rule refused.

Tuesday, Nov. 17th.

HOLDEN *against* RAPHAEL and ILLIDGE, Esquires, Sheriff of MIDDLESEX.

To a declaration against the sheriff for an escape on mesne process, defendant pleaded that, before the alleged escape, and before the expiration of eight days from the arrest, he took a bail bond, duly subscribed with a condition according to the form of the statute, &c., and assigned it to the plaintiff, which the plaintiff took; and the replication traversed that any condition was subscribed according to the form of the statute, &c.

Held, that the defendant did not support his issue, by producing a bail bond, which was regular in all respects except that, in the recital of the condition, the writ &c. was said to have been delivered "to the said ——;" and that, in the operative part of the condition, the words were "if the said —— do cause special bail, &c.;" the prisoner's name being omitted in those two places only.

CASE against the sheriff of *Middlesex*, for the escape of *Thomas Smedley Turner*, arrested upon mesne process under a capias at the suit of the plaintiff.

First plea, Not Guilty.

Second plea, that, after the arrest of *Turner*, and before he was suffered to go, &c., and before the expiration of eight days after the arrest, to wit, on &c., the defendants had taken from him a bail bond, with two sureties, whereby &c. (describing the obligatory part of the bond), to which said bond was duly subscribed a certain condition according to the form of the statute in such &c., for the due putting in of special bail for the said *Turner* according to the exigency &c.; and that afterwards, and before the commencement of this suit, to wit &c., the defendants duly assigned the bail bond to the plaintiff. Verification. Replication, that there was not any condition duly subscribed to the said bond according to the form of the statute, &c., in manner and form &c. Similiter.

On

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HOLDEN *against* RAPHAEL.

On the trial before *Littledale* J., at the *Middlesex* sittings in this term, the escape was proved. The bond (which was in a printed form) was produced, and appeared to be complete in the obligatory part, containing the names of *Turner* and his two bail as obligors. The condition, in the usual form, recited that the above bounden *Thomas Smedley Turner* had been taken by virtue of a writ against the said *Thomas Smedley Turner*, and that "a copy of the said writ, together with every memorandum or notice subscribed thereto, and all indorsements thereon, was on execution thereof duly delivered to the said ——; and whereas he is by the said writ required to cause special bail to be put in for him in the said Court to the said action within eight days after execution thereof on him, inclusive of the day of such execution; now the condition of this obligation is such, that if the said —— do cause special bail to be put in for him to the said action in his Majesty's said Court, as required by the said writ, then, &c." The two blanks were not filled up. The defendants' counsel contended that this bond, notwithstanding the omissions, supported the plea. The learned Judge refused to nonsuit, but gave leave to move for a nonsuit, and a verdict was returned for the plaintiff for *55l. 5s. 6d.*, the sum indorsed on the capias for bail.

On the same day (*Tuesday, November* 3d (*a*)),

Alexander moved accordingly. This condition was sufficient under the issue on the second plea. The obligatory part gives the full names of the obligors; and the recital, at the commencement of the condition, gives

(*a*) Before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

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the name of the party arrested, and shews that the writ was against him by that name: then the condition recites, that a copy of *the said writ* was, on the execution *thereof*, duly delivered "to the said ——." The due delivery could only be to the party arrested, and the blank must, therefore, be read as if filled up with *Turner's* name. The recital then continues, "And whereas *he* is required *by the said writ*," &c.; the requisition of the writ could only be upon the party arrested. So the word *him*, occurring twice immediately after, must be referred to *Turner*. Then follows the condition, "that if the said —— do cause special bail to be put in *for him*:" there can be no doubt that the blank means the same person as the word *him*, which must refer to the person referred to by the word *him* just before; and that clearly identifies the whole with *Turner*, the defendant named in the writ. The doctrine of intendment was carried quite as far as this in *Coles* v. *Hulme* (*a*), where, in an action on a bond for 7700*l.*, issue being joined on non est factum, the bond produced had in the obligatory part merely 7700, without any thing to designate pounds. By the condition, it appeared that the bond was given to secure various sums of money composed of pounds; and Lord *Tenterden*, at Nisi Prius, held, that from this the word "pounds" might be intended in the obligatory part: and the Court refused a rule for a nonsuit. Lord *Tenterden*, in bank, said, "In every deed there must be such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties. The question in this case is, Whether there is

(*a*) 8 *B.* & *C.* 568.

in

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in this bond that degree of moral certainty as to the species of money in which the party intended to become bound?" And *Bayley* J. said, "It has been decided, that in furtherance of the obvious intent of the parties, even a blank may be supplied in a deed." The reporters suggest in a note, that the decision alluded to was *Lord Say and Seal's Case* (*a*), where this Court supplied the name of the bargainor, in the operative part of a bargain and sale to make a tenant to the præcipe, the other parts of the deed enabling them to do so; and the decision was affirmed in the House of Lords (*b*). In the same note, other cases are cited to a similar effect; and, among others, *Langdon* v. *Goole* (*c*), which strongly resembles the present case. The nature of the instrument here is in favour of the desired intendment; for, by stat. 23 *H.* 6. *c.* 10. *s.* 7., the form of the condition is prescribed, "that the said prisoners shall appear," &c.; and stat. 2 *W.* 4. *c.* 39. *s.* 4. directs that the copy shall be "delivered to every person upon whom such process shall be executed;" and the act last mentioned supplies the form of the capias (sched. No. 4.), "safely keep" the party to be arrested "until he shall have given you bail." Now here the name of the person who is prisoner, and upon whom the process is executed, clearly appears by the recital in the condition; and, as the Court must know judicially to whom the writ was to be delivered, and who was to put in bail, they will, from this knowledge, and to avoid presuming a violation of duty, supply the two blanks. In *Flight* v. *Lord Lake* (*d*) the column in the memorial of an annuity, which, by stat. 53 *G.* 3. *c.* 141. *s.* 2., should have

(*a*) 10 *Mod.* 45.
(*b*) *Lord Say and Seale* v. *Lloyd*, 4 *Bro. P. C.* 73. (2d edit.)
(*c*) 3 *Lev.* 21. (*d*) 2 *New. Ca.* 72.

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been headed, "Person or persons for whose life or lives the annuity or rent charge is granted," was headed thus, "Person for whose the annuity is granted;" and the Court supplied the word "life," *Tindal* C. J. saying, "The only question is, whether any person applying an ordinary understanding to this memorial could misapprehend what was intended." That is the fair criterion in the present instance.

The Court took time to speak to *Littledale* J.

Cur. adv. vult.

Lord DENMAN C. J. on this day said: We are of opinion that there is no ground for granting a rule.

Rule refused.

Wednesday, Nov. 18th.

The KING *against* The Marchioness Dowager of DOWNSHIRE.

An indictment for obstruction of a public way, describing it as from *A.* towards and unto *B.*, is satisfied by proof of a public way leading from *A.* to *B.*, though turning backwards between *A.* and *B.* at an acute angle; and though the part from *A.* to the angle be an immemorial way, and the part from the angle to *B.* be recently dedicated.

B. was a church: the path from *A.*, after passing the point at which the obstruction took place, reached the churchyard, but not the church, before reaching the angle: Held by Lord *Denman* C. J., and semble, per *Coleridge* J., that this proof would not have supported an indictment describing the whole as an immemorial way.

INDICTMENT for obstructing "a certain common and public footpath, leading from the turnpike road from the parish of *Ombersley* to the parish of *Holt*, in the county &c., towards and unto the parish church of the said parish of *Ombersley*." Plea, Not Guilty. On the trial before *Williams* J., at the *Worcester* Summer assizes 1834, the obstruction was proved; but a question arose whether the path, shewn to be obstructed, answered the description in the indictment. The path

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commenced at a point in the turnpike road from *Ombersley* to *Holt*, and thence was continued to a gate opening into an inclosure, on the Western side of that inclosure. The obstruction was between this gate and the point before mentioned. The inclosure contained the site of the old parish church of *Ombersley*, which had been pulled down, and the new parish church, which had been erected, and was made the parish church, under an act of parliament (54 *G.* 3. *c.* ccxviii., local and personal, public). From the gate on the Western side, a path passed through the inclosure between the two sites, leaving the site of the old church on the right, and the new church on the left, to a gate on the Eastern side of the inclosure, and so to the village of *Ombersley*. Persons entering by the Western gate, going to the old church, turned off to their right from this path, after entering the inclosure, and went to the old church by a path in a South Eastern direction, forming an obtuse angle with their previous course. Persons entering at the Western gate, and going to the new church, followed the Easterly direction further on, and then turned off to their left, by a gravelled path, in a North Western direction, forming an acute angle with their previous course, and coming up to the new church itself. Sometimes, however, persons going to the new church, almost immediately after entering the Western gate, quitted the path running through the inclosure from West to East, and, turning to the left, crossed the churchyard to the new church in a North Eastern direction, forming an obtuse angle with their previous course, and some evidence was given to shew that the grass, on the part of the churchyard traversed by this last-mentioned route, was kept mown for the convenience of persons frequenting

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ing the new church; but this was not fully established. The spaces round the sites of the old church and the new church, on the right and left respectively of the path from the Western to the Eastern gate of the inclosure, were called respectively the old and new church yards, but they were open to each other, and both within the one inclosure. The path, from the point in the road from *Ombersley* to *Holt* to the Western gate of the inclosure, was an immemorial public path, and so was the path leading from West to East through the inclosure, and that connecting the last-mentioned path with the old church; but the public paths, if any, connecting the path from West to East with the new church, did not exist before the new church was built. The defendant's counsel objected that the parish church, mentioned in the indictment, must be considered to be the new parish church; and that the evidence did not shew that this was a terminus. His Lordship took a note of the objection, and permitted the case to proceed: and he finally left it to the jury, whether the path up to the new church had been dedicated to the public. Verdict, Guilty. In *Michaelmas* term, 1834, *Jervis* obtained a rule to shew cause why the verdict should not be set aside, and a verdict be entered for the defendant, or a new trial be had, on the ground of misdirection.

Talfourd Serjt., *Godson*, and *W. J. Alexander*, now shewed cause. First, the terminus is correctly described. Even if the path do not actually come up to the edifice of the church, it does, undisputedly, come to the churchyard, and that sufficiently answers the description "towards and unto the church." Such a description cannot

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cannot possibly mislead; and the obstruction itself was at an earlier part of the path; so that there is no necessity to construe this part of the description very strictly. Thus in *Clerke* v. *Cheney* (*a*) it is laid down that, if a justification in trespass be made out in virtue of a road over the locus in quo, it is not material, after verdict, whither the road leads. Even in the case of a private way it is not necessary to describe the intervening closes; *Simpson* v. *Lewthwaite* (*b*). *Rouse* v. *Bardin* (*c*) shews the same of a public highway of which the termini are set out. Lord *Loughborough* there differed from the majority of the Court; but the opinion of the majority was upheld in *Simpson* v. *Lewthwaite* (*b*). It is true that, in *Wright* v. *Rattray* (*d*), a way, described in the declaration as leading from *A*, over a close of the defendant, to *B.*, was held not to be established by proof of a way passing from *A.*, over the defendant's close, towards *B.*, but intercepted, between the defendant's close and *B.*, by a close over which there was no way: that was because the easement was described to be where it could not be. The party could not get *by that way* to *B.* And Lord *Kenyon* suggested that, if the way had been described as *towards B.*, it would have been good. That is so here. In *Allen* v. *Ormond* (*e*) it was held that a private right of way, laid as unto and into a public *highway*, was proved by evidence of a private way leading to a public *footway*, though perhaps the declaration might have been specially demurred to for want of certainty. Secondly, the path does in fact lead, by a route which deviates from a direct line only

(*a*) 1 *Vent.* 13.
(*b*) 3 *B.* & *Ad.* 226.
(*c*) 1 *H. Bl.* 351.
(*d*) 1 *East*, 377.
(*e*) 8 *East*, 4.

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by an obtuse angle, up to the edifice of the church, by the first turning to the left, over the mown grass. [*Williams* J. You can hardly carry that evidence so far as to make out a path over the grass.] Thirdly, the path actually reaches to the edifice of the church, by the gravelled path in the north western direction. It is certainly reflected back at an acute angle; but this is immaterial. It is not necessary that the path should be straight; nor are there any rules limiting the degree in which it may deviate from straightness. It would be different if the path, as described, could not lead to the terminus without actually retracing some part backwards. That was the case of *Rex* v. *Great Canfield* (*a*).

Jervis, *Whately*, and *Talbot* contrà. It is laid down by *Taunton* J., in *Simpson* v. *Lewthwaite* (*b*), that in pleading a public highway it is not necessary to set out the termini, but in pleading a private highway both termini must be set out with certainty. But, if the termini of a public highway be professedly set out, as here, they must be proved as laid. Here they are not so proved. The path should be shewn to reach actually up to the terminus, the church. One test of this is, that, if this indictment be supported, the defendant will be charged with the repair of all up to the church; therefore nothing less ought to be proved. Again, if she were hereafter indicted for the same obstruction, and the indictment were to describe the path properly as terminating at the Western gate, this record would not support a plea of auterfois acquit; for it would be said that the previous acquittal might have been for an

(*a*) 6 *Esp.* 136. (*b*) 3 *B.* & *Ad.* 233.

obstruction

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obstruction between the Western gate and the church: *Simpson* v. *Lewthwaite* (*a*) and *Rouse* v. *Bardin* (*b*) shew merely that the mention of the closes between the termini is not necessary. Here the objection is, that the termini themselves are falsely laid, and the path is described as extending farther than it actually does extend. *Jackson* v. *Shillito* (*c*) is distinguishable on the same ground: there the party was entitled to go from one terminus to the other, as he claimed, although part of the intermediate road was not an easement, but his own close. But, where the party had actually claimed a right of way over a close, which close was not his own, and over which there was no way, it was held that, as he could not reach the terminus named by the described way, the variance was fatal; *Wright* v. *Rattray* (*d*). That case is precisely in point; for here the path does not reach the terminus named: the language of *Dodderidge* J., in *Slowman* v. *West* (*e*), cited in *Wright* v. *Rattray* (*d*), goes still further. It is said that the terminus is referred to only by the word "towards." But the expression is "towards *and unto*:" "unto" means more than "towards." In *Lempriere* v. *Humphrey* (*g*) this Court held that, where an abuttal was referred to in pleading by the word "towards," and the other side did not complain of the uncertainty, but pleaded over, the party setting out the abuttal might apply the description to a place not contiguous to the abuttal, though the word "towards" was improperly used. That shews that the word "unto" restricts the descrip-

(*a*) 3 *B. & Ad.* 226.
(*b*) 1 *H. Bl.* 351.
(*c*) Cited in *Wright* v. *Rattray*, 1 *East*, 381.
(*d*) 1 *East*, 377.
(*e*) *Palm.* 387.
(*g*) 3 *A. & E.* 181.

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tion much more closely than the word "towards." Then, if it be necessary to shew that the path reaches the terminus named, does this path do so? It is attempted to establish this in two ways. The first is by the passage said to take place over the grass in the churchyard, which has no requisite of a path. The other is by resorting to the path which turns back towards the church, at an acute angle with the line of path previously gone over. If that were sufficient, any route, however circuitous and indirect, by which it was possible to get from one point to another, might be described as a path from the one to the other. It must be understood that the path should lead, in the common sense of the words, from terminus to terminus; *Rex* v. *Great Canfield* (*a*). Besides, if this indirect path be resorted to, the objection arises, that what is called a path is in fact two paths; one being ancient and immemorial, and the other recently dedicated. Had the indictment described the whole path as immemorial, it must have failed, on proof that part of the path was recent. Here the evidence of user shewed the intention of the prosecutor to treat the path as ancient throughout; and the indictment so explained is void for misdescription.

Lord DENMAN C. J. It apppears to me that there has been no misdirection. There is a path answering to the description in the indictment, by which you may reach *Ombersley* church. It is true that in doing so you must describe an acute angle; but that does not make a variance. *Rex* v. *Great Canfield* (*a*) is the only case which

(*a*) 6 *Esp.* 136.

appears

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appears to raise the question of misdirection. But there, in order to reach the terminus by the path described, it was necessary to return back over the ground already passed. Here, no part is passed over twice; but the objection is merely that, having reached a certain point, it is necessary to turn at an acute angle, and go on to the church by a different path. But this latter part of the path, though new, is as much a public path as the rest; so that no difficulty arises in that respect. If the whole path were described as immemorial, there would certainly be a variance. As to the suggestion respecting a second indictment, and plea of auterfois acquit, I do not feel the difficulty: it would always be necessary to shew where the obstruction complained of in the former indictment took place.

PATTESON J. I think there was no misdirection. I was struck with the argument, that part of the footpath in question was an ancient way, and part a way newly dedicated. But, upon consideration, I think that creates no difficulty. If it make up one entire road, it is immaterial at what time the several parts became public. If, as in *Rex* v. *Great Canfield* (*a*), the description could have been satisfied only by going to a certain point, and then returning back by the same route, it would have been a different case: but here you go along an ancient highway, and make an angle backwards, but do not retrace any part.

COLERIDGE J. I am of the same opinion. If the path were claimed as an immemorial highway, I should

(*a*) 6 *Esp.* 136.

feel

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feel a difficulty; but that is not so. The user sufficiently makes them one, for the purpose of the indictment, provided the jury find that all is a public highway to the church, though a circuitous one. Perhaps it is rather in favour of the prosecution, that the attempt to shew a way over the grass failed; for the inference is stronger that the other route is the path.

WILLIAMS J. I thought the evidence sustained the allegations, and that there was no variance. The question comes shortly to this: do the words "towards and unto" imply any degree of directness? There is no rule which lays down that, because a road forms an acute angle in order to reach a terminus, it does not lead "towards and unto" the terminus.

Rule discharged.

BROWN and Others *against* TAYLEUR.

Thursday, Nov. 19th.

ASSUMPSIT on a policy of insurance. On the trial before Lord *Denman* C. J., at the sittings in *London* after *Trinity* term 1834, it appeared that the insurance was upon goods and merchandize, and also upon the body, tackle, &c., of and in the ship *Penrith*, "lost or not lost, at and from her port of lading in *North America*, to *Liverpool*;" beginning the adventure upon the goods from the loading thereof on board, &c. A total loss was proved; but, upon the case for the plaintiffs, Sir *James Scarlett*, for the defendant, contended that there had been a deviation. The evidence on this point was as follows:—

The *Penrith* was launched at *Cocagne*, in the province of *New Brunswick*, at the end of *June* 1828. Her burden was 510 tons. A few days after she was afloat, she began to take in a cargo of timber at *Cocagne*, and she continued to do so for three weeks. The lower hold, which would contain from 400 to 500 tons, was loaded at *Cocagne*. During this time the vessel was described in evidence, as lying "in the stream, inside of the *Cocagne* bar." On the 1st of *August*, she sailed from thence to *Buktouche*, described by different witnesses as five, and seven, miles distant, to complete her loading. She arrived there in a few hours. *Cocagne* and *Buktouche* are situate on different creeks of the same bay. *Buktouche* is not in the line of voyage from *Cocagne* to *Liverpool*.

Insurance on a ship "at and from her port of lading in *North America* to *Liverpool*." She took in part of her cargo at *K.*, in *New Brunswick*, and then sailed from thence to *B.*, in the same province, seven miles distant, on the same bay of the sea. She there completed her cargo, and then returned to *K.* to receive provisions, &c., after which she sailed for *England*, and was lost on the voyage. *B.* was not in the way from *K.* to *Liverpool*. *B.* and *K.* were situate on creeks opening into the bay, and were spoken of by some persons as ports, but neither of them had a custom-house. They had custom-house officers, and were under the jurisdiction of the custom-house of *St. John*, *New Brunswick*.

Held that, after the ship had begun to load at *K.*, that was her port of lading; that the term "port of lading" in the policy did not allow of her afterwards going to *B.*, and that her doing so was a deviation.

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BROWN against TAYLEUR.

The *Penrith* lay off *Buktouche* three weeks to take in the residue of her cargo, and returned to *Cocagne* on the 22d of *August* to receive provisions, water and wood, and to get the ship ready for sea; but she took no additional cargo, unless (which was mentioned as doubtful) a few pieces of timber on the deck. She sailed for *England* on the 31st of *August*, and was lost on the voyage. *Cocagne* was spoken of by witnesses as a "harbour," and a "port," and *Buktouche* as a "port," but neither had a custom-house, though there were officers of customs at both places, and it appeared that both were within the jurisdiction of the custom-house of *St. John, New Brunswick*. The *Penrith*, though built at *Cocagne*, was registered at the port of *St. John* (*a*). The letter ordering the insurance was dated *August* 25th, 1828.

The Lord Chief Justice gave leave to move to enter a nonsuit on the objection taken, and the plaintiffs had a verdict. In the following term a rule nisi was obtained for entering a nonsuit, or for a new trial upon grounds which it is unnecessary to notice, as the decision of the Court did not turn upon them.

Sir *J. Campbell*, Attorney-General, *Wightman* and *Crompton* now shewed cause. At all events there is no ground for a nonsuit, because there was some evidence, at least, upon which the jury might be asked whether *Cocagne* and *Buktouche* were not parts of the

(*a*) It appears on reference to a map, that *St. John* is on one side, *Cocagne* and *Buktouche* on the other, of the neck of land which joins *New Brunswick* to *Nova Scotia*. *St. John* is on the bay of *Fundy*. *Cocagne* and *Buktouche* are in the gulph of *St. Lawrence*, each at the mouth of a river. The distance from *St. John* to *Cocagne* by land appears to be about 100 miles, in a direct line.

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same port of lading, within the meaning of this policy. It is not questioned that the ship was bonâ fide employed, at both places, in taking in her homeward cargo, and that, if the word "port" in the policy had been "ports," she would have been protected. The intention clearly was that the vessel should be covered by the policy, while fairly employed in taking in her cargo in *North America*. For the purposes of the insurance, *Cocagne* and *Buktouche* might both be considered as the port of lading. It is as if they were different parts of the cove of *Cork*, or any similar harbour. In point of fact it is well understood that, on coasts where wood is taken in, ships go from creek to creek for the purpose; and the present policy may have been framed as it is with a view to that practice. There is no reason for restricting the term "port" to the first place at which the vessel loads a piece of timber. Suppose this insurance had been "at and from her port of lading in *Jamaica*;" *Cruikshank* v. *Janson* (*a*) and *Warre* v. *Miller* (*b*) shew that, in that case, going from one part of the island to another, in any direction, for a legitimate purpose would not have vitiated the policy. *Bond* v. *Nutt* (*c*) is to the same effect. In *Constable* v. *Noble* (*d*), which may be cited for the defendant, it was held that a policy at and from *Lyme* did not protect a voyage from *Bridport* Harbour, which is within the port of *Lyme*; but there a place was named in the policy, and the voyage was commenced from a different place. So in *Payne* v. *Hutchinson* (*e*) a ship insured from *Caermarthen* sailed from *Llanelly*, which is a member of the port of *Caermarthen*, and the voyage was

(*a*) 2 *Taunt.* 301.
(*b*) 4 *B.* & *C.* 538.
(*c*) 2 *Coup.* 601.
(*d*) 2 *Taunt.* 403.
(*e*) 2 *Taunt.* 405. note (*a*).

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held not to be protected: but there also, the place named in the policy was different from that at which the voyage commenced; and the policy was "at and from *Caermarthen*" (not the port of *Caermarthen*), which evidently could not mean, at and from *Llanelly*. And the two places had distinct custom-houses. The vessel cleared out from *Llanelly*, not *Caermarthen*. To make the present case at all similar to that, the *Penrith* should have cleared out from *Buktouche*. *Cocagne* and *Buktouche* may be distinct harbours, but they are not distinct ports. They are inconsiderable places on the coast, not having their own custom-houses, but subordinate to that of *St. John*. A ship built at *Cocagne* is registered at *St. John*. In *Warre* v. *Miller* (*a*) *Abbott* C. J. observed that it did not appear whether there was any port, properly so called, in *Grenada*; but he relied on the fact that there was only one custom-house for the whole island, and adopted the proposition, there urged in argument, that *Grenada* must be considered as all one place. It is also to be observed here, that the letter ordering the insurance was dated *August* 25th: at that time the *Penrith* had returned to *Cocagne*, and there was nothing that could be called a deviation afterwards.

Maule and Sir *W. W. Follett* contrà. First, as to the nonsuit. The Lord Chief Justice, when he over-ruled the objection and reserved leave to move, must be considered as having directed the jury that, if the particular facts relied upon by the defendant were proved, they could, legally, make no difference as to the verdict. The distinction between "port" and "ports," in such

(*a*) 4 *B. & C.* 545.

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a case as this, is practically important. If the ship might sail to several places to take in her cargo, the risk was greater, especially where the vessel was to sail late in the year. The *Penrith*, when at *Cocagne*, was lying in a river, which was a harbour, and she went into the open sea to reach *Buktouche*. According to the argument for the plaintiffs, she might have gone in the same manner to any place in *North America*, without deviating; and the policy must be read as if the words "her port of lading in" were omitted. The usual form, where it is intended that a vessel shall go to different places, is to say "port or ports;" to give liberty to touch at different ports; and to specify "port or ports of discharge." Here the words are "*port* of lading." If *Cocagne* and *Buktouche* are not one port within the meaning of those words, the plaintiff's case fails, unless "port" can be shewn to mean the same as "port or ports." The word "port" must be taken in the common acceptation, as signifying a harbour or haven. If a vessel were lying within a place which in the common acceptation is a port, and merely shifted from one quay to another, it could not be said that she deviated within the meaning of this policy: but removing from *Cocagne* and *Buktouche* is going to a place entirely different. And if more than distinctness of situation is insisted upon, to constitute different ports, here it appeared that both places had custom-house officers, and that the necessary custom-house regulations for taking out a cargo might be fulfilled at either. If this does not make them distinct ports for the purpose of the policy, it must be contended that the vessel might have gone to *St. John*, where the custom-house

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was, without a deviation. In *Cruickshank* v. *Janson* (*a*) and *Warre* v. *Miller* (*b*) the policies were "at and from *Jamaica*," and "at and from *Grenada*." If the policy here had been at and from "*North America*," and not "her port of lading in *North America*," the case would, so far, resemble those; but if the words in those cases had been "her port of lading in" *Jamaica*, or *Grenada*, it probably would not not have been held that the vessel might go to different parts of the island. *Constable* v. *Noble* (*c*) and *Payne* v. *Hutchinson* (*d*) have not been distinguished from the present case. It is true that, in those instances, the voyage was at and from a place named; but the reasoning upon such cases is this. Either the parties intend that there shall be a coasting voyage, preliminary to the voyage home, in which case they use the words "port or ports," or some equivalent expression, and a higher premium is given; or they intend that the insurance shall be at and from a single port of lading, and use the appropriate words. In the latter case, when a port is expressly named, it is not sufficient that the voyage be commenced from some place which is merely a member of that port, if it be actually a distinct point: at all events such a policy will be taken to include only some one place which in common understanding is considered a port. *Cocagne* and *Buktouche* no more constituted one port, in this point of view, than *London* and *Gravesend*. If the places are distinct, their distance from each other is immaterial. In *Constable* v. *Noble* (*c*) the place in the port of *Lyme* from which the vessel sailed (*Bridport* harbour)

(*a*) 2 *Taunt.* 301.
(*b*) 4 *B.* & *C.* 538.
(*c*) 2 *Taunt.* 408.
(*d*) 2 *Taunt.* 405. note (*a*).

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harbour) was only nine miles from *Lyme*, at and from which she was insured. The observation upon the date of the letter does not alter the case: the risk was to begin at and from the port of lading, whatever that was, and might commence before the writing of the letter. [*Patteson* J. In the absence of fraud.] If the insurers had known of a deviation before writing the letter, that would be a circumstance of fraud; but that is not suggested. [*Patteson* J. Might not it be put that *Buktouche* was the port of lading, and that the ship called at *Cocagne* in her way to *England?*] That could not be, because she loaded between 400 and 500 tons of her cargo at *Cocagne*, before going to *Buktouche*.

Lord DENMAN C. J. I think that the rule for a nonsuit must be absolute. It was clear, on the close of the evidence for the plaintiffs, that *Cocagne* and *Buktouche* were two distinct places, and two places at each of which there might be a lading. There was no technical meaning to be attached to the words "port of lading." If it could have been shewn that the two places were in reality one, the plaintiffs should have produced evidence to that effect. My only doubt was, whether there should have been a nonsuit, or whether the defendant should have been called upon to give evidence on the subject; but as the plaintiffs themselves have made out a primâ facie case of distinctness, I think the defendant is entitled to a nonsuit.

PATTESON J. I am of the same opinion. We cannot construe the words "at and from her port of lading," as if they were "at and from her ports;" the expression used points out one single place. Nor can we adopt the

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technical meaning which may be ascribed to "port," as signifying all that is subject to one custom-house, or one port jurisdiction; the result of which would be that a ship, under such a policy as this, might sail to every part of a district so situated. The cases which explain the meaning of the word "port," as here used, are not many. There is one (*a*), where a brigantine was insured to Barcelona, and at and from thence, and two other ports in *Spain*, to a port in *Great Britain*; and she put into a place situate in the recess of a bay, having a custom-house and port captain, and having also warehouses, and a jetty, with accommodation for small vessels only, there being, however, convenient anchorage for large ones in the roadstead; and, the ship having been lost in the roadstead, this was held to be a port within the meaning of the policy. Here, I think that "port" means the same as place, and that the vessel's place of loading must be one place. When she had once begun to take her cargo at *Cocagne*, that was her place of lading, and her removal afterwards to *Buktouche* was a deviation. The cases of insurance at and from *Jamaica*, and *Grenada*, do not apply. There the words used would comprehend all places in the island. If the policies in those cases had said "at and from her port of lading in *Jamaica*" or *Grenada*, the commencement of the voyage would have been restricted to one particular place. That the two places here are within the jurisdiction of a single custom-house, makes no difference. If that entitled the ship to go from one to the other, she might also have gone to *St. John*. In construing the word "port" as the place of lading,

(*a*) *The Sea Insurance Company of Scotland* v. *Gavin*, 4 *Bligh, N. S.* 578. *S. C.* 2 *Dow & Clark*, 125.

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I do not mean to say that, if a ship were at a particular quay on a river, as at *Liverpool*, and merely removed to another quay a mile or two off, that would be a deviation, because the vessel there would be all the time in one port and place; but it is a deviation if she removes to a different town, a different place of habitation, and a point which might itself be her place of lading. As to the date of the letter, the policy would attach when the vessel began to load; and, if an unknown loss had happened before the writing of the letter, it would be covered by the policy. I think that there ought to be a nonsuit, because further evidence could not have altered the state of facts, or, if it could, the plaintiffs should have offered it when a nonsuit was applied for.

WILLIAMS J. The word used in the policy is "port" of lading, in the singular number: we cannot construe that as ports. And the moment the taking in of the cargo was begun at *Cocagne*, that was to be considered as the port of lading designated. Had evidence been given that, for purposes of this kind, *Cocagne* and *Buktouche* formed in fact only one place, the case would have been different. But if, by means of the construction attempted, places at a distance from each other can be included under the term "port of lading," what rule of restriction can be laid down? May the places be fifty, or a hundred miles apart? "*Jamaica*," and "*Grenada*," in the cases which have been referred to, signified the whole of those islands. It would have been a violence there to limit the meaning of the policy to a single port. Here, nothing warrants the extension insisted upon.

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COLERIDGE J. There must be a nonsuit in this case, unless we are prepared to say that "port" is equivalent to "ports," or to "port or ports." The plaintiffs must contend that it is an aggregate term, comprehending every member of a port, together with the chief port itself. But I think we are not at liberty here to construe the word with reference to custom-house regulations, but must consider it merely as indicating a place. Looking at it in this way, can we regard "port" as an aggregate term, comprehending a number of neighbouring places? I think not, and for this reason among others, that it makes a difference in the risk whether a ship stays at one place to load, or goes on a roving voyage to pick up a cargo. It is important in these matters that parties should come to a plain understanding; and if it is meant that a vessel should have the liberty of going to a number of places, though near each other, the party insuring had better express it so, than run a risk, at least, of deceiving the underwriters.

Rule absolute for a nonsuit (*a*).

(*a*) See, as to the construction of the word "port," *The Hull Dock Company* v. *Browne*, 2 *B.* & *Ad.* 43.

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CASE for infringing the plaintiff's patent for a reclining chair. The first count of the declaration set out the patent, by which his Majesty granted to the plaintiff, his executors, &c., full power, sole privilege, &c., that he, they, and every of them, and no others, at all times thereafter during the term of fourteen years, "should and lawfully might make, use, exercise and vend his said invention," within *England*, &c., and should have the whole profit, benefit, &c. of the said invention during the term. And, to the end that he and they might have the full benefit and sole use, &c., his Majesty, by a subsequent clause, commanded all persons in *England* &c., that neither they nor any of them during the term either directly or indirectly should make, use, or put in practice, the said invention or any part of the same, or in anywise counterfeit, imitate, or resemble the same, nor should make or cause to be made any addition thereunto or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors thereof, without the license, consent, or agreement of the plaintiff, his executors, &c. The count went on to state that the defendant, contriving to injure the plaintiff, and to deprive him of the profits &c., which he might and would otherwise have derived from the sole making, using, exercising and vending of the said invention, after the making of the letters patent and enrolling of the specification, and within the term of years &c., unlawfully and unjustly, without any such license as by the letters patent

In a declaration for infringing a patent which granted that the plaintiff, and no others, should "*make, use, exercise, and vend*" his invention, and forbade all persons to "make, use, or put in practice" the same, or to counterfeit or imitate it, without the plaintiff's license, the plaintiff alleged that the defendant without his license *exposed to sale* articles intended to imitate, and which did imitate, his invention:

Held, on general demurrer, that the count was bad, as not stating anything which was necessarily an infringement of the patent.

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patent was made requisite, did make, use, and put in practice the invention, viz. by making and vending divers, to wit, one hundred chairs in imitation of the said invention. The fourth count, incorporating by reference all the introductory statement of the first, alleged that the defendant did wrongfully and without licence *expose to sale* divers, viz. one hundred, other chairs which were intended to imitate and resemble, and did imitate and resemble, the said invention of the plaintiff, in breach of the said letters patent, and in violation of the privilege so granted to him as aforesaid. General demurrer to the fourth count. Joinder.

Channell in support of the demurrer. Exposing to sale, merely, is no violation of the patent. The king grants to the plaintiff, and his representatives, that they alone, shall "make, use, exercise and vend" the invention, and that they shall have the whole profit and benefit of it; and the letters patent forbid any other person to "make, use or put in practice" the invention, or to counterfeit or imitate it. Exposing to sale is not vending, nor does it come within any of the other words of the granting or the prohibiting clause. In statutes, where it is intended to make the exposing to sale a specific offence, express words are used for the purpose, as in the acts respecting copyright of books, 8 *Ann c.* 19., 12 *G.* 2. *c.* 36., 15 *G.* 3. *c.* 53., and the acts for protecting property in prints and other works of art, as 8 *G.* 2. *c.* 13., and 38 *G.* 3. *c.* 71. So, by the game laws, exposing to sale has been made a distinct offence. There is no ground therefore for contending that an exposure to sale is contemplated in a patent which makes no specific mention of it. The Court will not deviate from plain rules of construction to extend prohibitions

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hibitions of this kind. *Coleman* v. *Wathen* (*a*) and *Murray* v. *Elliston* (*b*) shew that such has been the principle of decision in analogous cases. (He was then stopped by the Court).

John Evans, contrà. The count sufficiently shews a violation of the patent. [*Patteson* J. The precedents in such cases always charge a selling. Can you say that an exposing to sale is equivalent?] The word "sell" does not occur in this patent. "Vend" is the term used. Exposing to sale is vending. In *Johnson*'s Dictionary, the explanation of "to vend," is "to sell; to offer to sale." In the Dictionary of the *French* Academy, some of the interpretations of "vendeur" apply to an offering for sale. In *Ainsworth*'s Dictionary, "vendo" is derived from "venum" and "do," and is explained "to sell, or set to sale." This question, therefore, cannot receive any illustation from statutes in which the word "vend" is not used. And taking the word, as it is joined with others in this patent ("make, use, exercise, and vend his said invention"), the natural and ordinary construction of it would be, sell, or offer for sale. As to the construction of patents generally, in *Harmar* v. *Playne* (*c*), *Holroyd* J., then at the bar, says in argument: "Patents were formerly considered as injurious monopolies, and were therefore construed by the courts with great strictness; but now when a more liberal and just view of the subject prevails, they are properly considered as highly advantageous to the public, by holding out an encouragement to ingenious men to disclose their inventions;" and Lord *Eldon*, when presiding in C. B., said, in a case of *Cartwright*

(*a*) 5 *T. R.* 245. (*b*) 5 *B. & Ald.* 657.
(*c*) 11 *East*, 106.

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v. *Arnott* (*a*), in *Easter* term 1800, that they were to be considered as bargains between the inventors and the public, to be judged of on the principle of keeping good faith by making a fair disclosure of the invention, and to be construed as other bargains. But further, an exposing to sale may come within the words "use" and "exercise." One use which a party makes, and advantage which he derives from an invention, is the reputation which he gains in his trade by offering the article for sale. According to the argument for the defendant, a man might exhibit the article in question for sale with impunity, if he only did it as an agent for some other person; or at least so long as no actual sale could be proved. In *Jones* v. *Pearce* (*b*), merely making the wheels which were the subject of the patent was held by *Patteson* J., at nisi prius, to be an infringement.

PATTESON J. (*c*). There no contest arose on that point. The declaration contained a count for making; and making, without leave or license of the patentee, was prohibited by the patent. Here, the prohibitory part of the patent does not even mention vending. It has hitherto been the practice of special pleaders, in declarations of this kind, to pursue the language of the patent in its granting or its prohibitory part. The word, indeed, generally used has been, not "vend," but "sell." It cannot be doubted, notwithstanding the authorities referred to, that there is a great distinction between vending and exposing to sale. And if a new

(*a*) See *Harmer* v. *Plane*, 14 *Ves.* 131, 136, where the dictum is referred to, and the case is cited as *Cartwright* v. *Eamer*.

(*b*) *Godson on Patents*, Supplement, pp. 10, 65.

(*c*) Lord *Denman* C. J. was absent.

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term is introduced in this patent, it is no injury to the patentee to say that he should follow the language so introduced, and use the word "vend" in his declaration. If he will adopt a different expression, and then come to the Court and maintain that it is an equivalent one, I think we ought not to encourage a speculation of that kind.

WILLIAMS J. Concurred.

COLERIDGE J. The granting part of the patent authorizes the plaintiff exclusively to "make, use, exercise, and vend" his invention. The prohibitory part forbids all persons to "make, use, or put in practice the said invention," or "counterfeit, imitate, or resemble the same," or to make "any addition thereunto, or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors," without license from the plaintiff. Then the count alleges that the defendant, without the plaintiff's license, exposed to sale divers chairs intended to imitate and resemble, and which did imitate and resemble, his invention. Do those words necessarily import the vending, spoken of in the granting part of the patent? I certainly think not; because, even assuming that to vend may mean both a selling and an exposing to sale (though I rather think that it means the habit of selling and offering for sale), still those two meanings are not co-extensive; the fomer may include the latter, but a mere exposure to sale, i. e. with intent to sell, or for the purpose of selling, is not only not equivalent to a sale, but, as regards the patentee, may be attended with wholly different consequences. If we read the word "vend" as expressly inserted in the prohibitory part of the patent, we ought only

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only to give it there the meaning which would effectuate the purpose of the patent, the prevention of acts injurious to the patentee, with as little restraint on the public as possible. It must be taken here that the defendant has only exposed to sale; that whatever may have been his original purpose in so doing, or whatever motive has supervened, he has abstained from selling. Now I cannot say that such a mere exposure to sale is necessarily injurious to the patentee; it may on the contrary be very beneficial; it is not therefore necessarily the vending, which is exclusively granted to him. As to "using and exercising," those words cannot be fairly resorted to, when we find with them the word "vending," and that is passed by. But, if they could, the argument would be the same; this might be an innocent using and exercising, and so not prohibited.

Judgment for the defendant.

BAYLIS *against* HAYWARD.

Friday, Nov. 20th.

To scire facias upon a judgment in assumpsit, by the original plaintiff, defendant pleaded plaintiff's bankruptcy, assignment, &c.; and that the causes of action in the original suit accrued before plaintiff became bankrupt. On special demurrer, for that the plea did not shew whether the judgment was recovered before or after the bankruptcy: Held, that the plea was bad, inasmuch as it did not appear but that the bankruptcy might have been pleaded in bar of the original action.

SCIRE facias upon a judgment in this Court, recovered, by the plaintiff in the scire facias, for 56*l.* 10*s.* for the damages which the plaintiff "had sustained, as well by occasion of the not performing certain promises and undertakings made by" the defendant to the plaintiff, as for the plaintiff's costs, &c. The scire facias was returnable 12th *November*, 1834.

First plea, nul tiel record; issue thereon, averring a judgment of *Michaelmas* term, 2 *W.* 4.

Second

Second plea, that the said *Henry Baylis*, before and on 20th *December* 1831, and from thence continually until the issuing of the commission hereinafter mentioned, was a printer, &c. (averment of his trading); and the said *H. B.*, so using the trade &c., afterwards, to wit on the day and year aforesaid, became and was indebted, &c. (averment of debt of 100*l.* to *Charles Martyr*, and other debts to other persons); and the said *H. B.*, being so indebted, &c., afterwards, on the day and year last aforesaid, and the said debt to the said *C. M.* and the said other debts being then wholly due, &c., became and was a bankrupt, &c.; and thereupon, afterwards, to wit, 3d *January* 1832, a commission of bankruptcy under the great seal, &c., bearing date at *Westminster* the day and year last aforesaid, upon the petition of the said *C. M.*, was duly awarded, &c., against the said *H. B.*, directed, &c. The plea then set out the commission, and that the commissioners afterwards, to wit, 7th *January* 1832, found that *Baylis* had become a bankrupt before the date of the commission, and adjudged him a bankrupt; and that afterwards, and after stat. 1 & 2 *W.* 4. *c.* 56., and before the issuing of the scire facias, and before the commencement of the proceedings in scire facias, to wit, 16th *January* 1832, the commission being still in force, *C. M.* and others were chosen assignees; and thereby, and by force of the said statutes, all the personal estate and effects of *H. B.*, as such bankrupt, became and are now vested in the said *C. M.* &c., as such assignees; by virtue of which premises, and by force of the statutes, the said *C. M.* &c., as such assignees, became and were entitled to the said damages, execution whereof is prayed as aforesaid: and the defendant averred that

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the causes of action, upon which the said damages were recovered, arose before the plaintiff became bankrupt as aforesaid. Verification.

Demurrer to the second plea, assigning for causes, that it is not stated with sufficient certainty, what was the nature of the causes of action for which the judgment was recovered, whether they were for a debt, or for liquidated or unliquidated damages, &c.; and for that it is not stated, with sufficient certainty, whether the judgment was recovered before or after the plaintiff became bankrupt; and that the plea does not state that the plaintiff's assignees interposed, or claimed the benefit to be derived from the said causes of action or the said damages; and also for that it is a maxim in law, that no matter of defence can be pleaded which existed anterior to the recovery of the judgment, nevertheless the said plea sets up such a defence; and also for that the said plea sets up matter in pais against the said record: and is in other respects &c. Joinder in demurrer.

Alexander in support of the demurrer. Nothing can be pleaded in bar of a scire facias on a judgment, which might have been pleaded in bar of the original action; note (4) to *Underhill* v. *Devereux* (*a*); Lord *Mansfield* in *Cook* v. *Jones* (*b*). Now here, though it is pleaded that the causes of action arose before the bankruptcy, it is not averred that the judgment was recovered before the bankruptcy; and, if it was subsequent, the bankruptcy, if available at all as an answer, was so as a bar to the judgment. Again, it does not appear that this was an

(*a*) 2 *Wms. Saund.* 72 *t.* (*b*) 2 *Cowp.* 728.

action

action for liquidated damages; and, if they were unliquidated, the right of action did not necessarily pass to the assignees. It is true that for some unliquidated damages the assignees might sue, *Wright* v. *Fairfield* (*a*); but they could not do so in all cases, as for instance in assumpsit for a breach of promise of marriage. Again, it does not appear that the assignees have interfered: and, if they have not, the plaintiff, although a bankrupt, might in many cases have a cause of action. Now, in every instance of ambiguity pointed out, the intendment must be against the plea; *Com. Dig. Pleader* (E 6.).

Mansel, contrà. The rights of the plaintiff became vested in the assignees, under stat. 6 *G.* 4. *c.* 16. *s.* 63., and stat. 1 & 2 *W.* 4. *c.* 56. *s.* 25. The rule, that what is pleadable to the original action is not pleadable to the scire facias, applies only to pleas touching the merits; here, the plea merely affects the technical question as to the party who is entitled to the benefit of the judgment. The defendant is, no doubt, precluded from disputing the original cause of action, or the amount of damages. But, as the bankruptcy occurred before the scire facias issued, the assignees are the proper parties to it. In *Kinnear* v. *Tarrant* (*b*) a plea that the plaintiff became bankrupt before the issuing of the alias scire facias was held good. Suppose the money had been paid to the bankrupt since the judgment, he could not be called as a witness to this fact, if the scire facias may be brought in his name. [*Coleridge J.* That argument might be used in every case of a scire facias, putting the bankruptcy out of the question.]

(*a*) 2 *B.* & *Ad.* 727. (*b*) 15 *East*, 622.

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tion.] Any thing may be pleaded which shews that *the plaintiff* is not entitled to have execution.

Alexander in reply. In *Kinnear* v. *Tarrant* (*a*) the bankruptcy seems to have been after the first scire facias, and before the alias scire facias: the case, therefore, does not shew that the bankruptcy could have been pleaded there, if it had occurred before the judgment.

PATTESON J. (*b*). The plea does not fix the time when the plaintiff became bankrupt: it avers, that he traded, and on, &c. became indebted, and that "afterwards, on the day and year last aforesaid," he "became and was" a bankrupt: it does not aver whether this was before or after the judgment. Then it avers, that afterwards, "to wit, on the 3d day of *January*, in the year of our Lord 1832," the commission was directed, &c.; and that afterwards, and after the commencement and taking effect of stat. 1 & 2 *W.* 4. *c.* 56., and before the issuing of the writ and the commencement of the proceedings in scire facias, the assignees were appointed; and that the cause of action arose before the plaintiff became bankrupt. All this may be true, and yet the bankruptcy may have been before the commencement of the original action, and, of course, before the judgment. If it were so, the defendant might have pleaded the facts to the original action; and there is no rule clearer than this, that whatever can be so pleaded cannot be pleaded to the scire facias. Certainly, in the cases cited to establish this rule, in Serjt. *Williams's Saunders* (*c*), it appeared affirmatively that the facts might

(*a*) 15 *East*, 622.

(*b*) Lord *Denman* C. J. was absent.

(*c*) Note (4) to *Underhill* v. *Devereux*, 2 *Wms. Saund.* 72 *t.*

have

have been pleaded to the original action; as where (*a*) an administrator, under letters of administration from the Archbishop of *Canterbury*, had recovered judgment, and then brought a scire facias, and the defendant pleaded that the intestate died in *London*, and had not bona notabilia in divers dioceses. Here it does not appear whether the matter could have been pleaded or not. But, as the defendant must have pleaded such a defence to the original action if he had the opportunity of so doing, he was bound to shew the Court when the judgment was obtained. The plea will be taken most strongly against the party pleading. Therefore the cause assigned in the special demurrer, that the plea does not shew certainly when the judgment was recovered, is a good cause of demurrer. How it would be on general demurrer, I do not say. *Kinnear* v. *Tarrant* (*b*) was a case of scire facias on recognizance of bail; and there the matter pleaded could not have been pleaded by the defendants earlier, the scire facias being the first proceeding against them.

WILLIAMS J. I am entirely of the same opinion, and for the same reasons. The defendant does not shew that the bankruptcy might not have been pleaded to the original action.

COLERIDGE J. I give my judgment on this short ground. The plaintiff having sued and recovered, must, primâ facie, be presumed to be entitled to the fruits of the judgment. Then it is said, that something has occurred to deprive him of this primâ facie right,

(*a*) *Allens* v. *Andrews*, *Cro. Eliz.* 283. (*b*) 15 *East*, 622.

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further, that, after the making of the said promise in the declaration mentioned, so far as it relates to the said debt of 20*l.*, to wit, on &c., the defendant paid to the plaintiffs the sum of 20*l.*, in full satisfaction and discharge of the said promises so far as the same relate to the same debt of 20*l.*, and of all damages sustained by the plaintiffs by reason of the non-performance thereof, and that the plaintiffs then accepted, &c., in full satisfaction and discharge of the said promises, so far as the same relate to the said debt of 20*l.*, and of the last-mentioned damages, &c. Verification.

To this plea the plaintiffs demurred specially, assigning for cause, that, although the plaintiffs have declared in 200*l.* for work and labour as attorneys, and in 200*l.* for money paid, and in 200*l.* for money due upon an account stated, yet the said defendant hath averred that a sum of 20*l.*, parcel of the monies in the first two counts mentioned, and a sum of 20*l.*, parcel of the monies in the said last count mentioned, are one and the same debt of 20*l.*, and not other or different debts, and the defendant hath not in and by his said fifth plea offered to take, or taken, a proper issue upon the said declaration, but hath pleaded and shewn other matters, and hath attempted to confine and reduce the said plaintiffs to one cause of action, instead of three separate and distinct causes of action; and for that the plea does not state to how much in particular of the sum in the first count, and to how much of the sum in the second count, the said last mentioned plea is pleaded. Other causes of demurrer were also assigned, which were not insisted on in argument. Joinder in demurrer.

Sixth plea. As to the sum of 72*l.* 3*s.* 9*d.*, parcel of the

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the said sum of 111*l.* 13*s.* 5*d.*, parcel of the money in the last count mentioned, the defendant pleaded special matter, which the plaintiffs traversed in their replication; on which traverse the defendants joined issue.

Seventh plea. As to the sum of 17*l.* 17*s.* 8*d.* (parcel of the said sum of 72*l.* 3*s.* 9*d.* in the second plea mentioned, parcel of the said monies in the first and second counts mentioned), and as to the sum of 39*l.* 9*s.* 8*d.* (residue of the said sum of 111*l.* 13*s.* 5*d.* in the first plea firstly mentioned, and to which the second plea is not pleaded), and as to the sum of 17*l.* 17*s.* 8*d.* (part of the said sum of 72*l.* 3*s.* 9*d.* in the sixth plea mentioned, and parcel of the money in the last count mentioned), and as to the sum of 39*l.* 9*s.* 8*d.* (residue of the said sum of 111*l.* 13*s.* 5*d.* in the said first plea secondly above mentioned, to which the said sixth plea is not pleaded), that, before and at the time of the commencement of this suit, the plaintiffs were, and from thence hitherto have been and still are, indebted to the defendant in the sum of 57*l.* 7*s.* 4*d.* for money had and received, and for money due on an account stated, which said money, so due and owing from the plaintiffs to the defendant, equals the damages sustained by the plaintiffs by reason of the non-performance by the defendant of the said promises in the declaration mentioned, so far as they relate to the sums to which this plea is pleaded, as in the introductory part hereof is mentioned, and out of which said money, so due and owing to the defendant as aforesaid, he the defendant is ready and willing, and hereby offers to set off and allow to the plaintiffs the full amount of the said damages; according to the form, &c. And this, &c. (verification.)

To this plea the plaintiffs demurred specially, assigning

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ing for cause, that the defendant, in the introductory part of the seventh plea, the same being a plea of set off, hath pleaded as to the sum of 17*l.* 17*s.* 8*d.* parcel &c., as therein mentioned, and as to the sum of 39*l.* 9*s.* 8*d.*, residue &c., as therein mentioned, and as to the sum of 17*l.* 17*s.* 8*d.*, parcel &c., as therein mentioned, and as to the sum of 39*l.* 9*s.* 8*d.*, residue &c., as therein mentioned; and then the defendant pleads that the plaintiffs were indebted in the sum of 57*l.* 7*s.* 4*d.* for money had and received, and on an account stated, and offers to set off that sum against the damages in respect of the said several sums in the introductory part of that plea mentioned, whereas that sum is insufficient to be set off against, and to pay and satisfy, the sums in the introductory part of that plea mentioned, or the damages in respect thereof; and that the sum of 57*l.* 7*s.* 4*d.* is pleaded to the whole of the sums in the introductory part of that plea mentioned, and not to a part thereof, and to the damages in respect of those sums, and not to a part thereof; and for that the said sum of 57*l.* 7*s.* 4*d.* does not and could not equal the damages sustained by the plaintiffs by reason of the non-performance of the said promises so far as they relate to the sums to which the seventh plea is pleaded, as in the introductory part thereof is mentioned; and for that the matters in the seventh plea pleaded are pleaded in bar of the said action, and not to a part thereof; and for that the said seventh plea is in other respects, &c. Joinder in demurrer.

John Bayley in support of the demurrer. As to the fifth plea. First, the defendant is not entitled to aver that the sums of 20*l.* are identical; and the objection is good

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good on special demurrer. Identity of closes, or of assaults, cannot be pleaded, if the objection be taken on special demurrer. The defendant attempts to confine the plaintiff to one cause of action, whereas three are alleged, each of which should be answered. The plaintiff is entitled to traverse the giving 20*l.* in satisfaction: but, if this plea be good, he cannot take such a traverse without admitting the identity. Secondly, the defendant ought to have stated to how much of the first and how much of the second count the fifth plea is pleaded. He has not shewn how much of each cause of action is answered.

As to the seventh plea. The defendant professes to answer a claim of 114*l.* 14*s.* 8*d.* by a counter claim of 57*l.* 7*s.* 4*d.*, and alleges that the latter sum equals the damages sustained by the nonpayment of the former, which is impossible. In *Thomas* v. *Heathorn* (*a*) it was held that a declaration in assumpsit for 1000*l.*, laying the damages at 1000*l.*, was not answered by a plea that the defendant, on an account stated, was found to be indebted 400*l.*, for which he had accepted a bill, and on which acceptance he was still liable.

Joseph Addison, contrà. As to the fifth plea. First, one sum may be demanded in several different forms: the defendant alleges that that is so here; and accord and satisfaction for that one sum is therefore an answer so far. The defendant does not aver that the three causes of action are identical; but that they are all, as to 20*l.*, for one identical sum of money. [*Patteson* J. You have averred that two sums of 20*l.* are one debt of 20*l.*: it is not as if you had averred that the account was

(*a*) 2 *B.* & *C.* 477.

stated

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As to the seventh plea. The defendant professes to answer a claim of 114*l.* 14*s.* 8*d.* by a counter claim of 57*l.* 7*s.* 4*d.*, and alleges that the latter sum equals the damages sustained by the nonpayment of the former, which is impossible. In *Thomas* v. *Heathorn* (*a*) it was held that a declaration in assumpsit for 1000*l.*, laying the damages at 1000*l.*, was not answered by a plea that the defendant, on an account stated, was found to be indebted 400*l.*, for which he had accepted a bill, and on which acceptance he was still liable.

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(*a*) 2 *B.* & *C.* 477.

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stated in respect of the other causes of action; or as if, to a declaration for goods sold and on a bill of exchange, the plea had been that the bill was given for goods.] Ten pounds might be due on two counts, and 10*l.* on the other. The rules of *Hil.* 4 *W.* 4. (*a*) allow a count for an account stated to be joined to any other count for a money demand, though there be not distinct subject matters of complaint. An averment of identity of two sums, followed by an averment of satisfaction, as here, was held good in *Sheldon* v. *Clipsham* (*b*); and the Court there said that, if the sums were distinct, the plaintiff might traverse the averment of identity; which is an answer to the complaint made on the other side of hardship as to the replication. Secondly, the method of pleading suggested on the other side is unprecedented, and would lead to much complexity. A tender is always pleaded generally to all the claims, whatever their number. [*Coleridge* J. How is the plaintiff to know which claim your plea applies to?] That might be argued also in the case of a plea of tender. It might as well be said that, whenever a defendant admits a sum to be due, he must take it on himself to say on which count it is due.

As to the seventh plea. It is true that the damages are claimed in the declaration in respect (so far as this plea is concerned) of 114*l.* 14*s.* 8*d.*; and that the set off is only for 57*l.* 7*s.* 4*d.* But the damages, upon these claims, may be no more than 57*l.* 7*s.* 4*d.* And it appears that, in fact, the plea answers as to 57*l.* 7*s.* 4*d.*, part of the claim made in the first and second counts, and as to 57*l.* 7*s.* 4*d.*, part of the claim made in the third count. If these counts be

(*a*) *General Rules and Regulations*, 5. 5 *B.* & *Ad.* iii.

(*b*) *T. Raym.* 449. According to the report in 2 (*Thomas*) *Jones*, 158, the Court said that the averment of identity was only surplusage.

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all for the same sum, as they may be, the damages upon these three claims might be only 57*l.* 7*s.* 4*d.* [*Patteson* J. You might have doubled your set off: the amount in the set off is as immaterial as that in the declaration.] That might be a more technical method; but the plaintiff cannot assume that the damages for the non-performance of the promise necessarily amount to the aggregate of the sums for which the promise is charged to be made. The declaration lays only 200*l.* damages for the non-performance of a promise to pay three sums of 200*l.* each. In *Thomas* v. *Heathorn* (*a*) the objection, as appears by the judgments of the Court, was that it was not alleged that no more than 400*l.* was due from the defendant: here there is a substantive allegation that the sum tendered equals the damages. [*Patteson* J. Then you put it as a case of unliquidated damages. If so, the plea of set off is bad. At present, we are inclined to think you wrong.] As a test of the correctness of the seventh plea, suppose an amendment were made by laying a larger sum than 114*l.* 14*s.* 8*d.* in the set off; still it would be necessary to aver that the set off exceeded or equalled the damages: which shews that the amount named is not material, but that the allegation as to the comparative amounts is the material part.

John Bayley in reply. As to the fifth plea. *Sheldon* v. *Clipsham* (*b*) would not be now supported.

As to the seventh plea; the allegation relied upon as to the amount is contradictory. The applicability of *Thomas* v. *Heathorn* (*a*) is disputed: but it appears from a MS. note of *Bayley* J., who was one of the

(*a*) 2 *B.* & *C.* 477.

(*b*) *T. Raym.* 449. *S. C.* 2 (*Thomas*) *Jones*, 158.

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Judges by whom that case was decided, that he took the view of it now contended for on behalf of the plaintiff. The note begins thus: "A plea is bad, if it is a legal bar to part only of what it professes to answer. *R.* 2 *B. & C.* 477." The note then gives an abstract of the pleadings in *Thomas* v. *Heathorn* (*a*), and adds, "The Court held the plea bad, for it professed to answer a claim for 1000*l.*, by stating what was legally an answer to 400*l.* only: the plea should have been confined to the 400*l.* only, and defendant should have pleaded non assumpsit to the residue." [*Addison.* The plea here does cover all the damages as to which it is pleaded.]

PATTESON J. (*b*). With respect to the averment of identity, I at first thought the objection good. Identity of trespasses in different counts cannot, in strictness, be averred; and it struck me that the objection to averring the identity of two debts was valid a fortiori, since in trespass the grievance may be charged to have been committed "on divers other days and times." In actions of assault, where there may be two counts for different assaults, one sees the objection to the averment of identity: and it appeared to me that different debts were, in this respect, like different assaults. But Mr. *Addison* has satisfied me on this point. The averment is, that the *sum* of 20*l.* charged to be due on the account stated, is the same *sum* of 20*l.*, parcel of the monies mentioned in the two first counts. The new rules (*c*) allow an account stated to be joined with any other count for a money demand, although there be

(*a*) 2 *B. & C.* 477. (*b*) Lord *Denman* C. J. was absent.
(*c*) *Reg. Hil.* 4 *W.* 4. *General Rules and Regulations*, 5. 5 *B. & Ad.* iii.

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not distinct subject matters of complaint. Therefore a sum due upon a consideration mentioned in another count may be the same as that claimed in the count upon an account stated. There are other grounds of demurrer, some of which Mr. *Bayley* gives up. The remaining ground of demurrer relied upon as to the fifth plea is, that it does not state to how much of the sum in the first count, and how much of the sum in the second, the payment is pleaded, but only that it is pleaded to 20*l.*, parcel of the monies in the first two counts mentioned. I think this a good objection, as the rules now are. We must take the claim for work and labour to be separate from that of money paid. It is therefore right that the defendant should let the plaintiff know what it is that he is pleading to. My only difficulty arose from the practice referred to, of pleading a tender generally to so much money. That has been the course for many years, and has become inveterate, and is never objected to. Now, however, we have come to a new system, or to the revival of old principles; and it does not follow that we should adopt generally the particular practice allowed in a plea of tender. The defendant should have shewn to how much of each count he pleaded; and the plaintiff must have judgment on the fifth plea.

As to the seventh plea, the objection insisted upon is, that a set off of 57*l.* 7*s.* 4*d.* is pleaded to several sums amounting in the whole to 114*l.* 14*s.* 8*d.*, with an allegation that the 57*l.* 7*s.* 4*d.* equals the damages sustained by reason of the non-performance of the defendant's promises so far as they relate to the sums amounting to 114*l.* 14*s.* 8*d.* The set off is not pleaded by way of deduction from the larger sum; and, indeed,

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I never saw such a thing as a set off pleaded by way of deduction. The practice is to lay, in the plea of set off, a larger sum than that claimed in the declaration. We know, in truth, that the object is only to enable the defendant to deduct a smaller sum from a larger. Still the statement on the record should be made consistent, which is effected by naming a sum larger than that claimed in the declaration. I do not know that it is necessary to say that the set off exceeds the sum claimed; perhaps a sum less than the amount claimed might be pleaded by way of deduction: but the statement is inconsistent now. Mr. *Addison* says that he does not allow that the claim for 114*l.* 14*s.* 8*d.* is good, but only pleads that the defendant has a claim of 57*l.* 7*s.* 4*d.*, which equals the *damages* sustained by the plaintiff. That, at all events, is a new way of pleading. Hitherto it was always thought that the party pleading the set off admitted, for the purpose of the plea, the sum claimed in the declaration. That is reasonable; for otherwise he should have confined his plea to a part. Else he treats the damages as unliquidated; and a set off cannot be pleaded to unliquidated damages. The defendant here might have averred the identity of the sums of 57*l.* 7*s.* 4*d.*, and have pleaded his counter-claim of so much. Or, if he chose to treat the claim as amounting to 114*l.* 14*s.* 8*d.*, he might have increased the nominal amount of his set off. But this is an attempt to set off a smaller sum as an equivalent to a larger. I admit that *Thomas* v. *Heathorn* (*a*) was decided on the particular ground, that the defendant did not allege that no more than 400*l.* was due. Mr. *Addison*

(*a*) 2 *B.* & *C.* 477.

says

says that the averment here, that the set-off is equal to the damages sustained, comes to the same thing as the averment which was required in *Thomas* v. *Heathorn* (*a*): but I think that is not so. The judgment on the seventh plea must therefore be for the plaintiff.

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WILLIAMS J. I am of the same opinion. Mr. *Addison* says that the statement of a counter-claim, appearing to be larger in amount than the sum claimed in the declaration, would not furnish an answer without a direct allegation that in point of fact it was larger: and that the allegation in his plea refers, not to the sums the payment of which was charged to be promised, but to the damages resulting from the nonpayment. But consider what promises are charged. If the damages be not admitted to be of the same amount, then they are unliquidated, and a set off is no answer. With respect to the fifth plea, my brother *Patteson* has shewn that the defendant ought to have specified how much was paid in respect of the first count, and how much in respect of the second.

COLERIDGE J. As to the seventh plea, I have nothing to add, except that I do not see why, since the new rules, a set off may not be pleaded as to part, by way of deduction, and non assumpsit as to the rest. As to the fifth plea, I do not think it is supportable upon principle. The plaintiff says, I have two causes of action: he has a right to know to what extent each of them is admitted or denied. Mr. *Addison* gives no reason, but simply relies on the practice as to tender.

(*a*) 2 *B.* & *C.* 477.

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I felt pressed with that: but I am satisfied that, if the question on a plea of tender came now before the Court, the argument in its defence would rest upon inveterate practice. On that alone the plea might be justified: but that is no reason for justifying the extension of the practice; and I am not disposed to extend it. This appears to me to be a new fangled attempt in pleading.

Judgment for the plaintiff.

Friday, Nov. 20th.

DOE on the Demise of HIGGS and others, Churchwardens and Overseers of the Parish of ST. MARY, READING, *against* TERRY, SIMONDS, and FORD.

In ejectment on the demise of the churchwardens and overseers of a parish, laid after the passing of stat. 59 *G.* 3. *c.* 12. (the seventeenth section of which vests all real property belonging to the parish in the churchwardens and overseers in succession, as a corporation), the lessors of the plaintiff proved that the defendant, ever since the passing of the statute, and for many years before, had paid rent to the churchwardens of the parish for the time being, and that the late churchwardens and overseers (who came into office after the statute passed) had given him notice to quit.

Defendant produced a lease for years, by *T. K.* and *J. K.*, therein described as churchwardens of the parish, to *W. E.*, made before the statute, in consideration of the surrender of a former lease; and also a lease for a term of years, yet unexpired, made before the statute, by *J. M.* and *N. C.*, described as churchwardens of the parish church, to *W. E.*'s personal representative, through whom defendant claimed, in consideration of the surrender of the lease first mentioned. In the last-mentioned lease the premises were described as "belonging to the parish church," and the rent was reserved payable to "the said churchwardens and their successors."

On a special case, stating these facts: Held,

That the property appeared to be parish property; that the leases passed no legal interest; and that the property, since the statute, was in the churchwardens and overseers in succession, who were intitled to treat the defendant as tenant from year to year, and to recover the premises upon giving notice to quit.

EJECTMENT for messuages and premises in the parish of *St. Mary, Reading*, in *Berkshire*. The demise was laid on the 1st of *May* 1834, and described the lessors of the plaintiff by their names and as the churchwardens and overseers of the poor of that parish for the time being. On the trial before *Alderson* B., at the

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Berkshire Summer assizes 1834, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case: —

The lessors of the plaintiff were the churchwardens and overseers of the poor of the said parish, at the times of the action being commenced, and of the demise in the declaration. A rent of 1*l.* 10*s.* per annum had been paid by the predecessors of the defendants in the tenancy to the successive churchwardens of the parish for many years before the passing of the stat. 59 *G.* 3. *c.* 12.; and, since that act came into operation, the rent had continued to be paid in like manner by the predecessors of the defendants, and by the defendants, until the expiration of the following notice. On the 23d of *March* 1833, a notice to quit (of which the following is a copy) was duly served on the several defendants. "To Messrs. *John Terry*, &c. You are hereby required to quit," &c., "all that messuage, tenement, or dwelling-house," &c., "situate," &c., "which you now hold of the churchwardens and overseers of the poor of the parish of *St. Mary, Reading*, to the churchwardens and overseers of the poor of that parish, on *Michaelmas* day next, or at the expiration of the current year of your tenancy. Dated the 20th day of *March* 1833. *John Okey, Richard Munt*, churchwardens of the said parish. *W. Winkworth, John Wheeler, W. H. Tyhurst*, overseers of the poor of the said parish."

The persons who signed this notice filled at the time the offices which they are described as filling, but had gone out of office before this action was commenced.

The defendants deduced the following title. A lease was put in, dated 23d *April* 1753, made between

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Thomas Knapp and *John Knott*, churchwardens of the parish of *St. Mary* in *Reading*, *Berks*, of the one part, and *William Earles* of the same parish, of the other part: probate of the will of the said *William Earles*, dated 1st *November* 1765: and an indenture, dated 2d *October* 1801.

By the indenture of lease of 23d *April* 1753, *Knapp* and *Knott*, in consideration of the surrender of a former lease, of which about twelve years were then unexpired, and also of a fine of 20*s*., demised the premises now sought to be recovered to *Earles*, for fifty-one years from *Lady-day* 1753, at the yearly rent of 30*s*.

The said lease, by virtue of the will of 1st *November* 1765, and the indenture of 2d *October* 1801, became vested in *Mary Searle*.

A lease was also put in by the defendants, dated 29th *April* 1802, between *John Moore* and *Nathaniel Clissold*, churchwardens of the parish church of *St. Mary* in *Reading*, of the one part, and *Mary Searle* of the other part, whereby, in consideration of the lease granted to *Earles* (of which two years were then unexpired), and of a fine of 70*l*., the premises in question, therein described to be parcel of the lands and tenements belonging to the parish church of *St. Mary* in *Reading*, were demised to the said *Mary Searle*, her executors administrators and assigns, to hold from the feast day of the *Annunciation* then last for fifty-one years, paying yearly to the said churchwardens and their successors the rent of 30*s*.

The defendants were the legal representatives of *Mary Searle*.

The lessors of the plaintiff contended that the last-mentioned lease was void; that the estate and interest

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in the premises had vested in the churchwardens and overseers of the poor of *St. Mary, Reading*, by the operation of the statute; and that the defendants' only interest therein had been as tenants from year to year, which the notice to quit had determined.

Talfourd Serjt. for the plaintiff. The premises appear, on the face of the statement, to be parish property. The plaintiff is therefore entitled to recover, unless the lease of 1802 be good. That is a lease granted by the churchwardens alone. Even since stat. 59 *G.* 3. *c.* 12. *s.* 17. (1819), the churchwardens could not grant a lease without the concurrence of the overseers, *Phillips* v. *Pearce* (*a*); before that act, no one had such a power. The churchwardens were not a body taking by succession; at the utmost, the individuals could grant for their own time only, as trustees for this parish. If this lease be good, the churchwardens might deal with the parish property to any extent; whereas it is vested in the churchwardens and overseers by stat. 59 *G.* 3. *c.* 12. *s.* 17., which applies, not only to buildings and lands hired or taken on lease by the churchwardens and overseers for the purposes of this act, but to "all other buildings, lands and hereditaments belonging to such parish." In *Doe dem. Jackson* v. *Hiley* (*b*) it was held that these words extended to every description of the real property of a parish. The lease of 1802 describes the lands and tenements as "belonging to the parish church." The rent has been paid continually to the successive churchwardens; that payment enures to the benefit of the parties legally interested, who are, since the statute,

(*a*) 5 *B.* & *C.* 433. (*b*) 10 *B.* & *C.* 885.

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the churchwardens and overseers jointly, as a corporation; and these are the parties who have given the notice. The acceptance of rent shews no more than a tenancy for the year. The learned Judge, who tried the cause, indeed, expressed an opinion that the parish officers took the rent *cum onere*; but there is no *onus*. *Doe, Lessee of Simpson*, v. *Butcher* (*a*) and *Jenkins dem. Yate* v. *Church* (*b*) shew that the acceptance of the rent does not necessarily affirm the lease.

Ludlow Serjt., contrà. Great injustice will be done if the lessors of the plaintiff are allowed to get rid of the title upon which the lease was granted. They insist on the estoppel by the words of the lease of 1802, yet they deny that the parties had power to make such a lease, so that the estoppel is not to be reciprocal. If the lessor of a plaintiff in ejectment makes a title, and a lease is set up in answer, he may impugn the lease: but, if his title rests upon a tenancy as shewn by the lease, he must admit the lease to be good. [*Coleridge* J. The lessors of the plaintiff make a case by the payment of rent and the notice to quit: then the defendants set up the lease.] In that view of the case, the defendants may shew in what character they paid. If the lessors of the plaintiff insist upon connecting the payments with the lease, they cannot dispute the lease. If the payments and lease are not connected, the payment is simply evidence of a reversion in the party accepting. In *Phillips* v. *Pearce* (*c*) the property of the parish had been demised by churchwardens alone after the passing of stat. 59 *G.* 3. *c.* 12.; such a demise was of course in-

(*a*) 1 *Doug.* 50.
(*b*) 2 *Cowp.* 482.
(*c*) 5 *B.* & *C.* 433.

valid,

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valid, because at that time the property, by the express words of sect. 17., belonged to the churchwardens and overseers jointly. But here the lease was made before the statute, and, taken alone, is evidence of a reversion in the grantors sufficient to enable them to convey. It appears also that the consideration for the lease was a surrender of an existing lease: such a surrender must be made to a party capable of accepting it. There is nothing in the case to shew that the churchwardens who made the lease may not have been trustees acting in their individual characters and not as parish officers, with power to demise. The founder of the trust may have wished the beneficial interest to go to the churchwardens for the time being. Even if the trustees had violated their trust, that would not avoid the lease at law. The reservation of rent to the successors may be bad, and yet the demise good. If the churchwardens and overseers now insist upon taking to the reversion in their character of a corporation, they must take it as other parties would, with the incidents of a privity in respect of the reversion. In *Doe dem. Jackson* v. *Hiley* (*a*) this point did not arise, for the lease had expired. At any rate, if the lease be repudiated, the evidence is narrowed to the payment of rent: then there is no evidence that the property is parish property, or church property, and the title of the lessors of the plaintiff fails. And, further, the description of the premises as "belonging to the parish church" does not necessarily shew that they belong to the parish, within the meaning of stat. 59 G. 3. *c.* 12. *s.* 17.

(*a*) 10 *B.* & *C.* 885.

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Talfourd Serjt., in reply. *Doe dem. Jackson* v. *Hiley* (*a*) and *Pearce* v. *Phillips* (*b*) were not relied upon as singly supporting the plaintiff's case, but as together establishing the two points, that all real property belonging to the parish is within stat. 59 *G.* 3. *c.* 12. *s.* 17., and that the churchwardens alone cannot lease such property as is within the act. That this is parish property is shewn by the payments to successive churchwardens, which fact makes it incumbent on the churchwardens to apply the profits to those purposes to which church rates are applicable. The plaintiff's case might be left here. It is suggested that the churchwardens in 1802 may have granted as individuals, and not in an official character. But that is inconsistent with the fact of the payments, which are made to successive churchwardens. The lease is, besides, bad on another ground, for the churchwardens had at any rate no right to let at a premium.

Patteson J. (*c*). My difficulty has been to see how this property is shewn to be parish property. One would expect to have its history previous to the lease. In *Doe dem. Jackson* v. *Hiley* (*a*) all the facts appeared: there were feoffees of a legal estate held in trust for the payment of church rates, and a lease of which the validity was admitted, and which had expired before the ejectment was brought. There was one demise by the feoffee's devisee; but certainly Lord *Tenterden*'s judgment is upon the demise by the parish officers, on the ground that the parish property was transferred from the party who had the legal ownership at the time of

(*a*) 10 *B.* & *C.* 885. (*b*) 5 *B.* & *C.* 433.
(*c*) Lord *Denman* C. J. was absent.

the

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the passing of stat. 59 G. 3. c. 12., to the parish officers, by that act. Now here it does not appear who had the legal property at the time of the act passing. My doubts, however, are removed by the fact that the payments of rent have been made to the churchwardens as such. The property, therefore, belonged to the parish in the popular sense, and in the sense of the act. And, therefore, upon the authority of *Doe dem. Jackson* v. *Hiley* (a), it now belongs to the churchwardens and overseers as a corporation. They received the rent: the defendants must be held to know the law, and to have paid to them in the character of a corporation. Then, this being a freehold estate, the question is whether the defendants held it as tenants from year to year, or on lease. We collect from the case that the parties demising were churchwardens; we must take it that they were the then existing churchwardens. But their demise passed no legal interest in the term, for churchwardens could not then hold land as such. No estoppel therefore was created as against their successors. It is not material to consider whether there was an estoppel as against the individuals; for the lessors of the plaintiff clearly do not claim by privity to the grantors. If they did, they could sue in covenant, describing themselves as assignees of the reversion; but that they could not do, because the churchwardens had no reversion. No legal interest, consequently, passed in the term. This is, therefore, a case of tenant from year to year who has received notice to quit; and there must be judgment for the plaintiff.

(a) 10 *B.* & *C.* 885.

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Williams J. I am of the same opinion. The doubts which I felt are removed by the documents and by the payments of rent. Both in the lease of 1753, and in that of 1802, the parties granting are described as churchwardens; and, in the latter lease, the premises are described as belonging to the parish church. Upon this a strong presumption arises, not, as my brother *Ludlow* suggests, that the grantors were trustees demising in their individual character; but one which is much more admissible, when we bear in mind the parties so demising and the property demised, namely, — that this was parish property. In addition to this, we have the continual payment to the parish officers for the time being; which renders the presumption conclusive and overpowering. Then, having got so far, do we find any estoppel? Clearly not: the lessors of the plaintiff are utter strangers to the grantors of the lease. The payment of rent would not constitute a sufficient case, if it were not aided by the statute. But, as this is parish property, and as there is nothing to prevent the operation of the statute, the plaintiff is entitled to our judgment.

Coleridge J. The only question is, whether there be a primâ facie case for the lessor of the plaintiff; for, if so, there is no answer to it. If the property be shewn to belong to the parish, but not else, there is a primâ facie case. Then does it so belong, or not, within the meaning of the act? You must take the words of this act in the popular sense: for, in the strict sense, lands do not belong to a parish. The case for the defendants helped out the plaintiff's case, by shewing that the grantors of the leases called themselves churchwardens. And the payments

payments have, in fact, been made to the successive churchwardens. Then is not this parish property? It comes then to a case of landlord and tenant.

Judgment for the plaintiff (*a*).

(*a*) See *Doe dem. Higgs* v. *Cockell*, *Hilary* term, 1836, post.

HALL *against* MAULE and SHEAT.

Saturday, Nov. 21st.

THE plaintiff had declared in prohibition.

Since the statute 1 *W.* 4. *c.* 21. *s.* 1. several pleas may be pleaded in prohibition, as in common actions between subjects.

R. V. Richards obtained a rule calling upon the plaintiff to shew cause why the defendants should not be allowed to plead six several pleas. Upon cause being shewn in the Bail Court, before *Littledale* J., his Lordship referred the matter to the full Court. The nature of the proposed pleas was set forth in the rule; but it was agreed, on the argument, that the Court should be called on to decide only the general question of the admissibility of several pleas in prohibition, and that the propriety of the particular pleas should, if necessary, be afterwards discussed before a Judge at chambers.

Godson now shewed cause. The declaration by the party in prohibition was always understood to be *qui tam*, the foundation for it being a contempt. This is laid down in *Com. Dig.* tit. *Prohibition*, (I), citing *Langdale's Case* (*a*). The stat. 4 *Ann. c.* 16. *s.* 4. authorises the pleading of several matters by the defendant or tenant in any action or suit, or by any

(*a*) 12 *Rep.* 61.

plaintiff

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plaintiff in replevin; but prohibition is not mentioned there; and it is laid down in *Com. Dig.* tit. *Pleader* (E. 2.) (*a*), that a defendant in *qui tam* cannot plead double, for which *Morgan* v. *Luckup* (*b*) is cited. The stat. 1 *W.* 4. *c.* 21. *s.* 1. makes no alteration in this respect, though it enacts that the declaration need not now allege the delivery of a writ, or a contempt. The formal allegation is now to be omitted, for the purpose of shortening the record: but the foundation of the proceeding is still the supposed contempt. Neither is any alteration, in this respect, introduced by stat. 3 & 4 *W.* 4. *c.* 42. *s.* 1. That section does not mention prohibition among the proceedings which the judges have power to alter. And, even if prohibition be within the enactment, the rules framed under it do not in fact authorise pleading more than one plea in this suit. They disallow the pleading of several pleas, except under the regulations specified; but they do not enlarge the power of pleading double.

Humfrey contrà was stopped by the Court.

PATTESON J. (*c*) We have no doubt upon the point. Under the old law, there could be only one plea pleaded, because the King was considered to be a party, and he could not be bound by the statute of *Anne*, as he was not named in it (*d*). But stat. 1 *W.* 4. *c.* 21. *s.* 1.

(*a*) P. 379. 4th ed.

(*b*) 2 *Str.* 1044. And see *Law* v. *Crowther*, 2 *Wils.* 21.; *Heyrick* v. *Boster*, 4 *T. R.* 701. The seventh section of stat. 4 *Ann. c.* 16. provides that the earlier enactments of the statute shall not extend to any writ, &c. upon any penal *statute*. *Morgan* v. *Luckup*, *Law* v. *Crowther*, and *Heyrick* v. *Foster*, were not cases of prohibition.

(*c*) Lord *Denman* C. J. was absent.

(*d*) See *Rex* v. *Wright*, 1 *A.* & *E.* 434.

enacts

enacts that the declaration in prohibition "shall be expressed to be on behalf of such party only, and not, as heretofore, on the behalf of the party and of his Majesty;" and, further, that it shall not allege "the delivery of a writ or any contempt." The reason of the former rule therefore fails; and prohibition is now like any other action.

WILLIAMS J. concurred.

COLERIDGE J. In reality, the delivery of the writ never took place; and the contempt was a mere fiction. That fiction is now done away with.

Rule absolute, without costs (*a*).

(*a*) The defendant had pleaded a single plea, including several matters, to which the plaintiff had demurred; and the defendant then made an application to amend the plea, by inserting the pleas mentioned in the present rule, which finally came on as above reported. The Court, in making the present rule absolute, gave the plaintiff the costs of the proceedings on the former pleadings.

Monday, Nov. 23d.

The KING *against* The Lords Commissioners of the Treasury.

The Lords of the Treasury agreed to submit a vote to parliament for granting a retired allowance to a public officer, on certificate of ill-health, according to stat. 3 *G.* 4. *c.* 113. The vote passed, but the pension was not specifically mentioned in the appropriation act, which, however, directed a gross sum to be applied in discharge of retired allowances. The Lords of the Treasury, on application by the party for payment, informed him that he might receive it from a treasury officer whom they named. The officer declined paying, inasmuch as he had no authority from the Lords of the Treasury, and they, being again applied to, refused to give such authority except on condition that the party would forego certain legal proceedings, which he refused to do.

Held, First, that the party had a legal right to the allowance, the Lords of the Treasury having submitted the grant to parliament, and having afterwards admitted that the money for paying the allowance was in their hands.

Secondly, that a mandamus lay to the Lords of the Treasury to order payment, inasmuch as the claimant had no other remedy; and as the writ was demanded, not against the King, but against officers into whose hands money had been paid under an act of parliament for the use of an individual.

A RULE nisi was obtained in this term for a mandamus, calling on the Lords Commissioners of the Treasury forthwith to issue a treasury minute or authority to the paymaster of civil contingencies, or other proper officer, directing and authorizing him to pay, or cause to be paid, to *William Carmichael Smyth*, the amount of the arrears of his pension, or retired allowance, of 166*l.* per annum, from the 5th of *April* 1826, to the 10th of *October* last, as voted to him by authority of parliament. The rule was obtained on an affidavit of Mr. *Smyth*, which contained the following statements: —

In 1826 Mr. *Smyth*, having served the office of a paymaster of exchequer bills for thirteen years, transmitted to the then Commissioners of the Treasury a medical certificate of his inability to discharge the duties, by reason of bodily infirmity, and solicited a retired allowance. He received in answer the following letter from Mr. *Hill*, then assistant secretary to the Treasury, dated *October* 11, 1826: —

"Sir, — I have it in command from the Lords Commissioners of his Majesty's Treasury to acquaint you

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that, upon a review of all the circumstances which led to your removal from the situation of paymaster of exchequer bills, and the continued distressing state of your health, my Lords will submit a vote to parliament for granting to you a retired allowance at the rate of 166*l.* per annum, to commence from the 5th of *April* 1826. I am, Sir," &c.

On the 25th of *November* 1829, he received a letter from Mr. *Dawson*, one of the then joint secretaries of the Treasury, of which the following is an extract: "I am further to acquaint you that three years have elapsed since my Lords communicated to you their intention, in consequence of the distressing state of your health, as described in a medical certificate annexed to your application to this board, to grant to you a retired allowance of 166*l.* per annum, to commence from the 5th of *April* 1826, and I am to inform you that that allowance, with any arrears which may be due upon it, will, like any other retired allowance, be paid to you on application to the paymasters of exchequer bills."

In *May* 1835, Mr. *Smyth* applied to Mr. *Nevinson*, one of the then paymasters of exchequer bills, for payment of his retired allowance, but was informed by him that the paymasters had no fund from which to pay it. Mr. *Smyth* thereupon wrote to Lord *Melbourne*, then first lord of the Treasury, as follows: —

"My Lord, — In 1827 I received a written communication from the then secretary to the Treasury, informing me that a pension of 166*l.* a year had been voted to me by parliament from the 5th of *April* preceding, and that the same would be paid to me upon application to the paymasters of exchequer bills. Circumstances unnecessary here to explain induced me to refrain

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refrain from making that application until this day." He then stated his application to Mr. *Nevinson*, and the answer, and requested to know where he was to apply for payment. He received an answer from Mr. *Anson*, Lord *Melbourne*'s private secretary, dated 5th *June* 1835, as follows: —

"Sir, — I am directed by Viscount *Melbourne* to acknowledge the receipt of your letter of the 28th instant, and in reply to acquaint you that you may receive your pension on application to the paymaster of civil services at the Treasury. I remain," &c.

On application to the paymaster of civil services, Mr. *Smyth* was informed that he had received no authority to issue the pension. Mr. *Smyth* communicated this to Mr. *Anson*, who promised to speak again to Lord *Melbourne* on the subject; and, on the 19th of *June*, Mr. *Anson* wrote to Mr. *Smyth* as follows: "Sir, — On inquiry I find it will be necessary for you to obtain authority for receiving your pension from the commissioners of the Treasury."

Mr. *Smyth* thereupon wrote to Mr. *E. J. Stanley*, then one of the joint secretaries of the Treasury, stating what had passed, and requesting him to forward the requisite instructions for issuing the pension. No answer was returned; but, on further application at the Treasury, Mr. *Smyth* was informed that he might learn from the solicitor of the Treasury on what condition his allowance would be paid. He afterwards received a letter from Mr. *Bourchier*, one of the joint solicitors of the Treasury, beginning as follows: —

"Sir, — I beg leave to acquaint you that I have been directed by the Lords of the Treasury to prepare an instrument

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instrument to be signed by you previous to your receiving the arrears of your retired allowance, to secure your instituting no further legal proceedings in respect of your late office, or your late colleagues in that office." Mr. *Bourchier* then suggested a bond, and requested to know if Mr. *Smyth* would execute one, with a surety. Mr. *Smyth* inquired if the undertaking on his part was to include criminal as well as civil proceedings against his late colleagues, and received for answer, that it was intended to comprehend all. Mr. *Smyth* then inquired whether, on his executing the bond, with a surety, the Lords Commissioners would make him a pecuniary compensation for the losses occasioned him by his late colleagues. The answer was, that they had no such intention. In reply, by letter dated *September* 11th, 1835, Mr. *Smyth* refused to execute a bond, and threatened legal proceedings if his arrears were not paid. He also sent copies of the last two letters to Lord *Melbourne*, requesting his interference, and referring to Lord *Melbourne*'s communication of *June* 5th. He received in answer a letter from Mr. *Anson* saying, "I am directed by Viscount *Melbourne*, to acquaint you that his Lordship has instituted inquiries at the Treasury, from which it appears that your letter of the 11th instant, addressed to the solicitor of the Treasury, is considered as having terminated the present communication with you on the subject of the retired allowance alluded to in your note." The affidavit further stated that no part of the allowance had been paid, and that Mr. *Smyth* was informed and believed that the whole of it had been regularly voted to him by parliament from the 5th of *April* 1826 to the present

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time, and was now in the possession, custody, or control of the present Commissioners of the Treasury.

No affidavit was filed in answer.

Sir *J. Campbell*, Attorney-General, and *Wightman*, now shewed cause. This is not a matter of which the Court has cognisance. It cannot be made a question here whether or not the Treasury was justified in making the payment conditional. Even if a legal right to the payment were shewn, the Court in the exercise of its discretion would probably not grant a mandamus; but here is no legal right. Assuming that this pension formed an item in the estimates laid before parliament in each year, that does not give a claim in point of law. The estimates are merely a ground submitted to parliament for introducing such a clause into the appropriation act as may sanction the payment. If, indeed, there had been an express direction in any of the appropriation acts, that this particular payment should be made, the case would be different: but that is not so. Thus in the act for 1834, 4 & 5 *W.* 4. *c.* 84. *s.* 17., the grant is general: "58,858*l.*, for retired allowances to persons formerly in public offices or in the public service." The statutes 50 *G.* 3. *c.* 117., and 3 *G.* 4. *c.* 113., which sanction and regulate the granting of retired allowances, do not give any vested, indefeasible right in them. A fund is created by the latter act, out which they are to be granted, and the proportionate amounts are fixed; but, as to the granting of them, no new rule is introduced. No instance can be cited of a mandamus like that moved for. It is against principle that the Court should order a mandamus

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damus in the name of the King, directing the King to pay money. If the party had a legal claim, the proceeding should be by petition of right to the King. In *Rex* v. *Hornby*, or *The Bankers' Case* (*a*), on writ of error to the Exchequer Chamber, it was held by *Treby* C. J., with whom Lord *Somers* concurred, that, on petition to the Court of Exchequer for the allowance of letters patent of *Charles* II. granting an annuity out of the hereditary revenue of excise, and for payment of such annuity, that Court could not enforce the payment. *Treby* C. J., after admitting the validity of the grant, said: "Now I come to the remedy, which I take to be the great and difficult point of the case. And I am of opinion, that no judgment can be given upon this petition to the Barons; for I do not think that the Court of Exchequer has any power to dispose of the King's treasure, and therefore I cannot see how this judgment can have any effect. Indeed it is said, that the petitioner will have a writ to the officers of the Treasury, or to the treasurer himself, and if they do not obey this *liberate*, that then they will enforce it by action; but this they cannot do, for I hold that the treasurer may choose, upon bare warrant, to pay in what order he thinks fit." Then, after going into the authorities, he says: "The case in short is no more than this: suppose the King be indebted to the petitioners, and also to the army, the fleets, &c. now who shall direct the payment of these debts, the barons or the treasurer? who is the best judge of the state of the kingdom and of its necessities? So that suppose there was only 4000*l.* in the Exchequer,

(*a*) 5 *Mod.* 29. *S. C.* 14 *How. St. Tr.* 1.

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and we were threatened with a foreign invasion, How shall this money be disposed? Says the treasurer, To raise men, to pay the army and our fleets, that by their assistance we may prevent the enemy from coming amongst us. No, say the barons, we must pay the bankers with this money." The same arguments will apply to this case, and the authority of this Court to grant a mandamus.

J. Jervis and *Welsby*, contrà. In the case just cited, the judgment of the Exchequer Chamber was reversed, and a majority of the judges, even in that court, differed from Lord *Somers*, who decided it of his own authority as Lord Keeper. But that case does not apply. The sum claimed by this applicant is not money over which the Crown has any control. It is money paid into the Treasury by a third hand for the specific purpose of discharging this pension. Government grant the pension when they determine on applying for it to parliament; this is sufficiently explained by the letters set out in the affidavit; then the sum is voted by parliament, and a payment is made into the Treasury, specifically, to meet that vote. The statute 3 *G.* 4. *c.* 113. (reciting stat. 50 *G.* 3. *c.* 117.) directs that the allowances to be granted under those statutes shall be laid before parliament, and regulates the scale upon which they shall be estimated; and, that account being before the legislature, the appropriation act, directing a certain sum to be applied to the payment of such allowances, appropriates, in effect, to each a corresponding portion of the general sum voted. It makes no difference that a gross sum is voted for the payment of many allowances. In some cases, by stat. 3 *G.* 4. *c.* 113. *s.* 5., the special grounds

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grounds for a proposed allowance are to be submitted to parliament. Suppose that were done, and a vote passed, covering the amount of the particular allowance, could the Treasury afterwards withhold payment? The statutes say nothing of any special order to be given by the Treasury for payment to individuals, after the sum is voted. By stat. 3 *G.* 4. *c.* 113. *s.* 4., in the case of persons under a certain age, no superannuation allowance is to be granted, but upon certificate (which was given in the present case); and the commissioners there mentioned are to express satisfaction with the party's conduct, in their minute recommending or directing the grant of such allowance. When the allowance has been laid before the legislature with the sanction of the Lords Commissioners of the Treasury, and confirmed by vote, and the money received into the Treasury in pursuance of such vote, the party interested has a complete right, and is entitled to a mandamus, though perhaps a mandamus would not have lain in the first instance to the Lords Commissioners, to make the recommendation. That the money in this case has been paid into the Treasury is evident from several letters set out in the affidavit, particularly that of Mr. *Anson* (5th *June* 1835), saying "you may receive your pension on application to the paymaster of civil services at the Treasury." The Lords Commissioners cannot withhold the payment, or annex to it a condition, especially one which is illegal, viz. the dropping of a criminal prosecution. It is contended that this is an application for a mandamus to the King; but the mandamus would go merely to the members of a public board, whose duty it is, under stat. 3 *G.* 4. *c.* 113., to direct payment of the allowances voted, who are authorised to order this particular payment, by the

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appropriation act, and who have the money in their hands for the purpose. The claimant here has no effectual remedy but by mandamus; for an indictment, though a remedy, would not be a beneficial one to him.

Lord DENMAN C. J. (After stating the nature of the application.) The affidavits shew that Mr. *Smyth* held an office, in respect of which the Lords Commissioners of the Treasury had authority, under the statute 3 *G.* 4. *c.* 113., to grant a superannuation allowance. The letter of their officer, Mr. *Hill*, in *October* 1826, announced their intention to submit a vote to parliament for granting such an allowance. They did so; and, by a subsequent letter of Mr. *Dawson*, one of the secretaries of the Treasury, Mr. *Smyth* was informed that the allowance, to commence from the 5th of *April* 1826, would be paid on application to the officers pointed out in that letter. I do not look to the votes of the House of Commons as shewing what this party is entitled to; but it is shewn by the letters of Mr. *Hill* and Mr. *Dawson*. The statements in those letters make the Lords Commissioners the depositories of Mr. *Smyth*'s money; and they are not entitled to withhold it, or annex conditions to the payment. Some years passed without any demand of the allowance; but in 1835 Mr. *Smyth* applied to one of the paymasters of Exchequer bills, to whom he had been referred, but without success: and, on application to the first Lord of the Treasury, he was informed that he might receive his pension from the paymaster of civil services. It is unnecessary to go particularly into the correspondence of this year; but, on the part of the Lords of the Treasury, it amounts to a recognition that they have the money, and have the control

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trol over it: but they seek to annex conditions to the payment, which they have no right to do. If then this is only the case of public officers having the control of a sum of money for this particular purpose, there is no reason that a mandamus should not issue. They are officers under the Crown, but the Crown has no more to do with them, for this purpose, than with any other officers. They are merely parties who have received a sum of money as trustees for an individual, under the provisions of an act of parliament. In *The Bankers' Case* (*a*) the application was not for a mandamus, and the circumstances were different. If, as has been suggested, it should on any occasion be unsafe, with reference to the public service, to make a payment of this kind, the fact may be stated on return to the mandamus. There might perhaps be occasions on which the Lords Commissioners would be bound to apply the money to particular purposes of a more pressing nature; but that does not appear in the case before us. Here it only appears that a sum of money has been voted as an allowance to an individual, which sum they have, and refuse to pay.

PATTESON J. I am of the same opinion. Two objections have been made to this application. First, it is said that the party has no legal right, because the appropriation act does not give any thing to him individually, but only directs a lumping sum to be applied in the discharge of retired allowances. But it appears that under the first four sections of stat. 3 *G.* 4. *c.* 113. the Lords Commissioners of the Treasury have power

(*a*) Or *Rex* v. *Hornby*, 5 *Mod.* 29. *S. C.* 14 *How. St. Tr.* 1.

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to grant these allowances, and that they agreed to grant this; and then the letter of their agent shews that they afterwards received money for the purpose. The effect of the letter is the same as if they had said, "Out of the gross sum voted by parliament we have received so much for this pension, which is in the hands of our officer." Secondly, it was made a question whether mandamus were the proper remedy. I think that the party has no other, and that this is the proper one. After the letter from Mr. *Dawson* in 1829, no further application was made till 1835: then Mr. *Smyth* applied to the paymaster of Exchequer bills, and was informed that he had no funds. On further application at the Treasury he was referred to a different officer, but that officer stated that he had no authority. Mr. *Smyth* renewed his application to the Lords of the Treasury; but he was then told that, if the payment were made, it must be upon conditions. In point of law, when the sum had been once appropriated and received at the Treasury, the Lords Commissioners could not annex conditions to the payment. It was in their power to pay, because they have shewn by their correspondence that they exercised a dominion over the money. This is not like *The Bankers' Case* (*a*). The proceeding there was not for a specific sum in the hands of a public officer, but for payment of an annuity, granted generally out of the hereditary revenue, to discharge a debt of the Crown. Here the demand is not against the Crown, but against public officers having money in their hands to be paid to an individual, and who seek to annex a condition to the payment.

(*a*) Or *Rex* v. *Hornby*, 5 *Mod.* 29. *S. C.* 14 *How. St. Tr.* 1.

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WILLIAMS J. I am of the same opinion. A mandamus ought not to issue where there is a discretionary power, or where there is another legal remedy. Here it is not suggested that there is another remedy: and, whatever discretionary power there may have been in this instance, the time for exercising it was long past. The making of the allowance had been agreed upon, and the money appropriated to the purpose. Then why was it withheld? Only because the party would not comply with conditions which it does not appear that there was any power to impose.

COLERIDGE J. The statute 3 *G.* 4. *c.* 113. empowers the Lords of the Treasury to consider the cases of certain persons there pointed out, and to grant them retired allowances. Are we to presume that such grants are to take effect or not, merely at their pleasure? The presumption, I think, is to the contrary. Then, as to the effect of the vote, the only view appears to be this; the Lords Commissioners recommend the grant; parliament votes it, and appropriates a sum in gross for paying the whole of that class of allowances; the Lords Commissioners receive the sum in gross, and are to parcel it out among the parties to whom grants have been made. Have they done so in the case of Mr. *Smyth*? It appears that they have, from year to year. And when he applies for payment, he is answered, "There it is for your use: go to such an officer and you will receive it." There is a distinct admission that the sum is in the possession of the board for this purpose. On going to the paymaster of civil services, Mr. *Smyth* is told that he has no authority to pay. This motion, then, is an application

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to the Court to enforce the granting of that authority by the Lords Commissioners. Can it be objected that the party has a legal remedy without a mandamus? Only two can be suggested. One is by petition of right; but I do not think that would lie, because it supposes the King to be in full possession of the chattel or hereditament claimed. Here he is not in possession of the sum applied for, and has no control over it. It is appropriated by act of parliament, and in the power of a public board. Would money had and received lie? The paymaster of civil services holds the money for Mr. *Smyth*'s use, but would not be liable for omitting to pay it over, till Mr. *Smyth* came to him with a proper authority from the Lords of the Treasury, supposing that he would be liable then. I therefore think that there is no legal remedy, and that a mandamus ought to go.

Rule absolute (*a*).

(*a*) See the observations of the Court on a subsequent application by the same party against the Lords Commissioners; *Rex* v. *The Lords Commissioners of the Treasury*, *Easter* Term 1836.

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FRANCIS COOKE ROGERS *against* JOHN HUMPHREYS.

Monday, Nov. 23d.

REPLEVIN for cattle, goods, and chattels, taken *October* 14th, 1833. The defendant avowed the taking of the cattle, goods, and chattels, as a distress for rent due and in arrear from the said plaintiff to the said defendant, and averred that it became payable on the

A mortgagee, after default in payment by the mortgagor, has (if he think proper to exercise them) the same rights against a tenant by lease granted before the mortgage, as the mortgagor had, and may take his remedy on such lease, as assignee of the reversion. If the lease was made by the mortgagor subsequently to the mortgage, the mortgagee may treat the tenant as a trespasser, but cannot distrain, or sue for rent, unless he has accepted rent from the tenant, or has given him notice to pay rent, and the tenant has acquiesced.

A deed to lead the uses of a recovery, after reciting that the premises were to be conveyed for the purpose, among others, of securing payment of 800*l.* advanced by *J. H.* to *M. R.*, tenant in tail in remainder, declared the uses as follows: — To *H.* and *L.*, their executors, &c., for 1000 years, to commence from the day before the date &c., in trust (subject to the powers, &c., after mentioned), upon nonpayment of the 800*l.* and interest, to sell or mortgage, and pay that sum to *J. H.*: and, from and after the determination of that term, and subject meantime thereto, and to the trusts thereof, to *E. R.*, mother of *M. R.*, for life: remainder to *T. L.*, his executors, &c., for 2000 years, to commence from the day of the decease of *E. R.*, in trust to levy and repay such sums as *E. R.* should during her life pay to *J. H.* for interest on the 800*l.*, and to suffer the person next in remainder or reversion expectant on the first term to receive the residue of rents not applied in executing the trusts of the latter term: remainder, and in the meantime subject thereto, to such uses as *M. R.* should appoint, and, in default of appointment, to him for life: remainders to his sons and to his daughters in tail: remainders over.

A power was then reserved to *E. R.* to demise the premises for ten years from the date of the deed, or seven years from the day of her decease, reserving the best rent, &c.

E. R. demised the premises to a tenant for seven years from the day of her decease, reserving rent "to *M. R.*, or the person for the time being entitled to the freehold or inheritance of the premises immediately expectant" on the decease of *E. R.* She died, and the lessee entered. *M. R.* died shortly afterwards, and left a daughter. Afterwards the trustees of the terms of 1000 and 2000 years assigned them to *J. H.*, default having been made in the payment of his 800*l.*

Held, that the seven years' lease granted by *E. R.*, being made under a power created by the deed of uses, must be deemed contemporaneous with the term of 1000 years created by the same deed, and binding on the trustees of that term, who were parties to the deed, so that they could not disturb the possession.

That the trustees of that term, though not "entitled to the freehold or inheritance," were the reversioners entitled to the rent reserved by the lease, and, consequently, that their assignee might distrain for it.

And this, although an ejectment had been brought against the lessee, on the demises, among others, of the last-mentioned trustees (laid previously to their assignment to *J. H.*); there having been no judgment, nor any actual eviction of the lessee.

The Court, after giving the above decisions on a special case, ordered judgment to be entered up for the successful party for half a year's rent. On application of that party in the next term, it appearing, on reference to the special case and postea, that the rule for judgment should have been for a year's rent, and no judgment having yet been entered up, the Court, after cause shewn, amended the rule on payment of costs.

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20th of *May* and 20th of *November* in every year. Plea, non tenuit; and issue thereon. On the trial before *Patteson* J. at the Spring assizes for *Shropshire*, 1834, the defendant had a verdict for 150*l.*, the amount of the rent in arrear (*a*), subject to the opinion of this Court on the following case.

By indentures of lease and release (*b*) dated 24th and 25th of *September* 1830, the latter being made between *Elizabeth Rogers* widow, who was tenant for life of the premises thereby conveyed, of the first part; *Milward Rogers*, tenant in tail in remainder of the same premises, of the second part; *William Henry Rosser*, of the third part; *John Williams*, of the fourth part; *John Humphreys*, the defendant, of the fifth part; *William Humphreys* and *Thomas Lloyd*, of the sixth part; and *Thomas Lloyd*, of the seventh part; after reciting (*c*) that *John Humphreys* had agreed to lend *Milward Rogers* 800*l.* on the security of his bond, and of the hereditaments after-mentioned and referred to in that recital, which 800*l.* *John Humphreys* had paid to *Milward Rogers*; it was witnessed that, for barring all estates tail in the hereditaments after mentioned, *Elizabeth Rogers* and *Milward Rogers* did convey to *Rosser* the premises in respect of which the distress was taken, to the intent that he might become tenant to the præcipe for suffering a common recovery, wherein *Williams* should be demandant, *Rosser* tenant, and *Milward*

(*a*) So stated in the introduction to the special case.

(*b*) The several deeds referred to were to be considered as part of the case.

(*c*) It was also recited, that *Milward Rogers* was desirous of discharging the premises from all estates tail, remainders, &c., and that *Elizabeth Rogers*, in consideration of natural affection for her son *Milward Rogers*, had agreed to join him in making a tenant to the præcipe.

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Rogers vouchee. And it was agreed that the said recovery, and those presents, and all other conveyances and assurances to be made or suffered by and between all or any of the parties, should enure to the use of the said *William Humphreys* and *Thomas Lloyd*, their executors, administrators, and assigns, for the term of 1000 years, to commence from the day next before the day of the date thereof, but nevertheless upon the trusts, &c., and subject to the powers, provisoes, &c., hereinafter expressed: and after the determination of the said term, and in the meantime subject thereto and to the trusts thereof, to the use of *Elizabeth Rogers* for life, without impeachment of waste; remainder, from and after her decease, or other sooner determination, &c., to the use of the said *T. L.*, his executors, &c., for the term of 2000 years, to commence from the day of the decease of *E. R.*, or other, &c., upon the trusts after declared; remainder, after the determination of the said estate, and in the meantime subject thereto, and to the trusts thereof, to such uses as *Milward Rogers* should appoint, with the consent in writing of certain parties, in manner therein mentioned; and, in default of such appointment, or so far as the same should not extend, to the use of *M. R.* for his life without impeachment of waste; remainder to the use of trustees to preserve contingent remainders; remainder to the use of the first and other sons successively of *M. R.* in tail general; remainder to the use of the daughter and daughters of the said *M. R.* in tail general, share and share alike as tenants in common, &c.; remainders over; and ultimate remainder to the use of the right heirs of *M. R.* Proviso that, in such conveyance or conveyances as aforesaid, it should be provided and declared to be

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lawful for *Milward Rogers* to appoint as before-mentioned, without such consent in writing as before required, provided such appointment were by way of sale or mortgage, and the purchase-money or loan should not exceed 200*l.* over and above the 800*l.* secured to *John Humphreys*. And, as to the term of 1000 years, it was declared that the same was limited to *W. Humphreys* and *Lloyd* upon trust that, on non-payment by *Milward Rogers* of the 800*l.* and interest to *John Humphreys* on the 25th of *March* then next, it should be lawful for the trustees, by sale, mortgage, or other disposition of the premises, at the request of *John Humphreys*, to levy, and pay to him, the 800*l.* and interest. And, as to the term of 2000 years, to levy in the same manner such sums as *Elizabeth Rogers* should, during her life, pay to *John Humphreys* for interest on the 800*l.*, and also a further sum of 600*l.*, and to pay the same in manner therein mentioned: and upon further trust to permit the person next in remainder or reversion expectant on the term of 1000 years to receive the residue of the rents and profits remaining after, and not applied in execution of, the trusts declared of the last-mentioned term: proviso that, when the trusts of the two terms should have been executed, and the costs of the trustees paid, the two terms should cease. And it was declared and agreed that it should be lawful for *Elizabeth Rogers* to demise all or any part of the premises for any term not exceeding ten years from the date of the present indenture, or seven years from the day of her decease, to take effect in possession, so as there should be reserved the best rent that could be gotten without premium, and so as the lease should contain certain conditions

conditions for re-entry on non-payment of rent, for good husbandry, &c. There were also covenants by *Milward Rogers* to *W. Humphreys* and *Lloyd* for title, &c.; and for entry by them without let from *Elizabeth Rogers* or *Milward Rogers* on non-payment of the 800*l.* or interest.

The recovery was duly suffered. *Milward Rogers* (by indenture of *June* 13th, 1831) appointed in fee in pursuance of the power reserved to him, to secure the repayment of 200*l.*, subject nevertheless to the life estate of *Elizabeth Rogers*, to the mortgage to *John Humphreys*, and to a proviso for redemption.

By indenture of lease, *September* 17th, 1831, after reciting the indentures of *September* 24th and 25th 1830, *Elizabeth Rogers*, by virtue of the power given to her by the last-mentioned deed, demised the premises aforesaid to the plaintiff for the term of seven years, to be computed from the day of her decease, paying to *Milward Rogers* or the person or persons who for the time being should be entitled to the freehold or inheritance of the demised premises immediately expectant on the decease of *Elizabeth Rogers*, the yearly rent of 150*l.* by two equal half-yearly payments, the first to be made at the end of six calendar months next ensuing the day of her decease (*a*).

Elizabeth Rogers died, 20th *November*, 1831, when the plaintiff, by virtue of the lease to him, took possession, which he retained until the distress. *Milward Rogers* died *June* 25th 1832 (without having appointed in pursuance of the power reserved to him by the indentures of *September* 24th and 25th, except as above mentioned), leaving an infant daughter, *Emma Rogers*.

(*a*) See, as to the other particulars of this demise, *Doe dem. Rogers* v. *Rogers*, 5 *B.* & *Ad.* 755.

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By indenture, *July* 30th, 1832 (*a*), *W. Humphreys* and *Lloyd* assigned to the defendant the term of 1000 years; and *Lloyd* also assigned to a trustee for him the term of 2000 years.

In *October* 1832, the plaintiff paid *Mary Rogers*, the widow of *Milward Rogers*, 75*l.*, half a year's rent from the death of *Elizabeth Rogers*; and at *Christmas*, 1832, he tendered to the said *Mary* another half year's rent, which was not accepted. In *Michaelmas* term 1832, an ejectment was brought against the plaintiff and his tenants, on the demises (laid *July* 16th 1832,) of the said *Emma Rogers*, of the said *Mary Rogers* and others, guardians of the said *Emma*, and of *W. Humphreys* and *Lloyd*, for the purpose of setting aside the lease of *September* 17th, 1831. The present plaintiff claimed in that action to hold under the last-mentioned lease. The ejectment was still depending when this case was stated (*b*). At the trial of the present cause, the defendant's counsel objected that the issue roll in the ejectment was not evidence against him, but the learned judge admitted it. The case was argued in *Hilary* term (*January* 20th), 1835 (*c*).

R. V. Richards for the plaintiff. The first question is, whether the defendant, as mortgagee of the term of 1000 years, was entitled to distrain. A mortgagee

(*a*) Reciting that the 800*l.* and interest were not paid at the day appointed, that neither *Elizabeth Rogers* nor *Milward Rogers* had paid any interest, and that *Humphreys* had requested of *W. Humphreys* and *Lloyd* an assignment of the term of 1000 years by way of mortgage, and had agreed to advance to *Lloyd* 600*l.* and interest.

(*b*) See *5 B. & Ad.* 755.

(*c*) Before Lord *Denman* C. J., *Littledale*, and *Williams* Js.

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(having given notice of his claim for the rent) may distrain upon a tenant of the mortgagor under a lease prior to the mortgage, *Moss* v. *Gallimore* (*a*), but not where the mortgagor has granted such lease after the mortgage, *Alchorne* v. *Gomme* (*b*). It is true that in *Pope* v. *Biggs* (*c*) this Court held that a mortgagee, having given notice, might receive from tenants under leases subsequent to the mortgage the rents due at the time of such notice, and those accruing afterwards. But there no discussion arose as to the right of a mortgagor to distrain upon such tenants. To that right the relation of landlord and tenant is indispensable. The question there was not between the mortgagee and the tenants, who were willing to pay any party entitled, but between the assignees of a bankrupt mortgagor, and an agent who had received, and paid to the mortgagee, rents due from the tenants, after notice given to them by the mortgagee to pay him the amount due to him for interest, in part of the rent, with a threat that, if that were not done, he would take legal remedies for recovering the same. There the mortgagee might at any time have evicted the tenants by ejectment, and recovered the rent as mesne profits, and such eviction would have been an answer to any demand of the rent by the mortgagor; but the mortgagee might also waive that remedy, and receive the rent at once from the tenants, if they were willing to pay it. This reasoning, upon which all the judges grounded their decision, will not extend to the present case. It was said there, that the notice had the same effect as if the tenants had attorned,

(*a*) 1 *Doug.* 279. (*b*) 2 *Bing.* 54.

(*c*) 9 *B.* & *C.* 245.

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placing them in the situation of tenants to the mortgagee. Here no notice has been given, and therefore that new relation is not created. The Courts have indeed held that an unpaid mortgagee may eject the mortgagor or his tenant by demise subsequent to the mortgage, without notice to quit, or demand of possession, *Keech, Lessee of Warne*, v. *Hall* (*a*), *Thunder dem. Weaver* v. *Belcher* (*b*), *Doe dem. Roby* v. *Maisey* (*c*), *Doe dem. Fisher* v. *Giles* (*d*), even when he has admitted the receipt of interest on a day subsequent to the date of the demise in the action of ejectment, *Doe dem. Rogers* v. *Cadwallader* (*e*). But this power, if the mortgagee chuses to retain it, is inconsistent with the relation of landlord and tenant: and, on the other hand, if the mortgagee allows that relation to be created by giving notice, as in *Pope* v. *Biggs* (*g*), the power to eject summarily no longer exists. In this case there is nothing to shew that the trustees of the term of one thousand years, or their assignee, might not at any time have ejected the plaintiff. And further, the trustees in this case have intimated their election to treat the plaintiff as a trespasser and not as a tenant, by bringing an ejectment. It may be said that, although the declaration in ejectment contains a demise by the trustees, they had assigned the term before the action was commenced. But the demise is laid at a time previous to the assignment.

Again, the defendant, to have a right of distraining, should be the reversioner. But he was not so. The deed of *September* 25th created a term of 1000 years in

(*a*) 1 *Doug.* 21.
(*b*) 3 *East*, 449.
(*c*) 8 *B.* & *C.* 767.
(*d*) 5 *Bing.* 421.
(*e*) 2 *B.* & *Ad.* 473.
(*g*) 9 *B.* & *C.* 245.

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the premises, and at the same time gave a life estate in those premises to *Elizabeth Rogers*, and added a power to her of leasing, which she has executed. The trustees could not have a reversion expectant on her life estate, for a life estate is greater than any term; they could not have distrained upon her, neither could they upon the lessee under the power, whose term formed an extension of her life estate. The rent reserved by the lease was payable to *Milward Rogers*, or the person for the time being entitled to the freehold of inheritance; not to the trustees of the term; and the tenant has in fact paid it to *Emma Rogers*. The mortgagee in this case could not be presumed to distrain as agent for the mortgagors. They had one of several particular estates carved out by the same deed. There was no privity of estate between them and the lessee of *Elizabeth Rogers*; her lessee did not stand in the relation to them of tenant under a demise, which relation is necessary to authorise a distress for rent; *Dunk* v. *Hunter* (*a*). *Elizabeth Rogers* demised on her own behalf, not on theirs. Settlements of this kind are common, but no attempt like the present has been made before. *Doe dem. Courtail* v. *Thomas* (*b*), which was cited for the defendant on the trial, was decided with reference to the intention of the parties as evinced by the deed then before the Court, and cannot influence the decision of this case.

Talfourd Serjt., contrà. First, as to the ejectment said to be depending. The issue roll in that suit could be no evidence against the present defendant.

(*a*) 5 *B.* & *Ald.* 322. (*b*) 9 *B.* & *C.* 288.

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The action was brought on behalf of *Emma Rogers*; though the declaration of course contained demises by all the parties in whom there could be a legal estate outstanding, and, among them, by the trustees of the term of 1000 years. But there was nothing to render the present defendant privy to the suit. Then as to the other points. There is a great difference between cases of mortgage in which the mortgagee may be a stranger to the tenancy created by the mortgagor, and those in which, the tenancy being already created, the mortgagee becomes assignee of the reversion. In these last it cannot be contended that no privity exists between the assignee and the lessee of the assignor. Now it is shewn by *Moss* v. *Gallimore* (*a*), and other cases, that a party becoming mortgagee after the creation of a tenancy is in the same situation, with respect to the tenant, as any other assignee of a reversion; and some of the cases which have been cited, go far to shew that, where a mortgagee permits the mortgagor to hold on and create new tenancies, he may adopt or repudiate them at his pleasure; though a doubt may certainly arise in this latter class of cases, as to the mortgagee's right to distrain. But here the question is, whether, upon the terms of the particular deed in question, the mortgagee does not, for this purpose, stand in the situation of a reversioner, as in the case of a mortgage created after the tenancy. By the deed to lead the uses of the recovery it is recited that *John Humphreys* has lent to *Milward Rogers*, the tenant in tail, 800*l*., which *Milward Rogers* proposes to secure upon the hereditaments in question. Then, in the first place, a term of 1000 years is granted to *W. Humphreys* and *Lloyd*, upon

(*a*) 1 *Doug.* 279.

trust,

trust, as it is afterwards declared, to levy and pay to *John Humphreys* his principal and interest if not otherwise paid. The next use declared is for *Elizabeth Rogers* during her life; and a power is afterwards given to her of granting certain leases. Then a term of 2000 years from the decease of *Elizabeth Rogers* is granted to *Lloyd*, upon trust to levy certain sums by sale or mortgage of that term, and to permit the person next in remainder, or reversion, expectant on the term of 1000 years, to receive the residue of the rents and profits not applied in executing the trusts of the term of 2000 years. Then follow remainders to such uses as *Milward Rogers* shall appoint; and, in default of appointment, to him for life; remainders to his sons and daughters in tail; remainder to his right heirs. It is clear from the trusts declared of the term of 2000 years that the rents on the leases to be granted by *Elizabeth Rogers* under the power were to be received by the trustees of the term of 1000 years; that the rents were then to be applied in executing the trusts of the term of 2000 years; and the residue to be afterwards received by the persons in remainder, or reversion, expectant on the term of 1000 years. The leasing power took precedence of that term; the lease granted under it was the first estate in possession, and the termors for 1000 years were in the situation of immediate reversioners, and were the only parties who could distrain. The point now insisted upon, as to the precedence of the leasing power, was decided by the Court, on the construction of this very deed, in *Doe dem. Rogers* v. *Rogers* (*a*); and *Doe dem. Courtail* v. *Thomas* (*b*) was there referred to as in point.

(*a*) 5 *B.* & *Ad.* 764. (*b*) 9 *B.* & *C.* 288.

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The judgment delivered in that case is precisely applicable to this. As was said by Lord *Tenterden* there, if it were held that the term vested in the trustees was to be the first legal estate in the premises, the leasing power would be null and void. No person could be a legal tenant by a lease created under that power, till all the trusts had been executed. The leasing power, therefore, must be considered here as taking effect first, though the words "subject thereto" (that is to the term of 1000 years) "and to the trusts thereof" override it, and with a view to those trusts it is required that the best improved rent shall be reserved by the leases granted under the power. [*Littledale* J. referred to *Isherwood* v. *Oldknow* (*a*)]. That case is in the defendant's favour. The lease here is granted to the plaintiff for seven years, paying to *Milward Rogers*, "or the person for the time being entitled to the freehold or inheritance of the demised premises immediately expectant on the decease of *Elizabeth Rogers*," the yearly rent of 150*l*. Now, in *Isherwood* v. *Oldknow* (*a*), where a lease was made under a power, with a reservation of rent in similar terms, a remainder-man for life (under the devise creating the power) was held to be an assignee entitled to take advantage of the covenant for payment of the rent so reserved. (*b*) The words in the present case, "entitled to the freehold or inheritance," do not properly apply to a termor, but it cannot have been intended to sever the rent from the reversion. The meaning was, that the party entitled to the next legal estate should have the rent. In *Isherwood* v. *Oldknow* (*a*) the remainder-man for life was considered as coming within the description

(*a*) 3 *M.* & *S.* 382. (*b*) Stat. 32 *H.* 8. *c.* 34.

scription of person "entitled to the freehold and inheritance;" yet, although he had the freehold, he had not the inheritance. Here, the termors for 1000 years had such a parcel of the freehold and inheritance as entitled them to the rent, according to the terms of the lease. At all events the immediate reversion, which was in them, would draw the rent after it. In *Co. Litt.* 47 a., it is said: "If two joint tenants be, and they make a lease for years by parol, or deed poll, reserving a rent to one of them, this shall enure to them both; but if it be so reserved by deed indented, it shall enure to him alone by way of conclusion." This point is also illustrated by the judgment of Lord *Hale* in *Sacheverel* v. *Frogate* (*a*), where it is said that a reservation "must be carried over to the party which should have succeeded in the estate if no lease had been made;" and, "put the case, that lessee for 100 years should let for 50, reserving a rent to him and his heirs during the term; I conceive this would go to the executor." So in *Doe dem. Rogers* v. *Rogers* (*b*), where it was objected that the covenant there in question was of a matter to be done after the death of the lessor, and that no one but the heir could sue, the executors not being named, *Parke* J. said "It is a covenant to do the thing during the term, and therefore the executors *can* sue." If then the rent here follows the immediate reversion, which the termors have, the right to distrain is also incident to it. And there is no one who can exercise that right if the defendant cannot. The execution of the power reserved to *Milward Rogers* evidently cannot interfere with the right of the termors for 1000 years;

(*a*) 1 *Ventr.* 161. *S. C.* 2 *Saund.* 367 *a.* (*b*) 2 *Nev. & M.* 555.

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the power operated only on his remainder, and is executed subject to *Elizabeth Rogers*'s life estate, and the defendant's mortgage (*a*).

R. V. Richards, in reply. If the leasing power takes precedence of the term of 1000 years, the trustees of that term had no legal estate, but only a reversion; and their mortgagee has not even the common right of ejecting. No such case has ever occurred. According to the argument on the other side, not only the leasing power, but the life estate of *Elizabeth Rogers* (of which the power to lease for seven years is only an enlargement), would take precedence of the term; and the same might be contended even as to the power of appointment in *Milward Rogers*. But the true construction is, that the trustees took the immediate legal estate for 1000 years, although the term would not be put in force till default were made in the payments secured by it; and in the meantime the other parties would have the use of the land, according to the estates limited to them. *Elizabeth Rogers*, in the lease granted by her, reserves rent, in the usual way, to the person entitled to the freehold or inheritance immediately expectant on her decease. [*Littledale* J. It is probable, from the last words, that the person she had in view was *Emma Rogers*.]

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. After stating the substance of the deeds,

(*a*) *Talfourd* Serjt. afterwards referred the Court to *Watkins on Conveyancing*, part 2. (by *Coventry*,) pp. 305, 306, note (*b*), 5th ed.; pp. 317, 318. note (*d*), 7th ed.

and

and the principal facts of the case, his Lordship proceeded as follows: —

A great many cases were cited at the bar to shew what the rights of a mortgagee are, against the mortgagor and those claiming under him, where there is a lease prior to the mortgage, and also what they are when there is a lease subsequent to the mortgage, and which cases it is not necessary to cite or comment upon, as they establish this principle, that, if the mortgagor himself remains in possession, the remedy against him on default in payment at the day is by ejectment. And if there be a lease, and such lease is prior to the mortgage, the mortgagee has the same rights against the lessee and those claiming under him that the mortgagor had, and no other than he had, and his remedy must be on the lease as assignee of the reversion, as long as the lease is in existence, and the tenant acknowledges his title; but if the lease be subsequent to the mortgage, then the mortgagee may treat the lessee and all those who may be in possession as wrong-doers, and may bring an ejectment, but he cannot distrain or bring any action for the rent they have contracted to pay, as there is no relation of landlord and tenant between them, unless they choose to pay the rent to the mortgagee, and he accepts it; in that case there is a relation of landlord and tenant created between the mortgagee and the tenants, and the remedy of the mortgagee will depend upon the particular circumstances of each case; no notice is necessary to be given by the mortgagee that he means to proceed against such tenants, where they come in subsequent to the mortgage, because in such case their title is wrongful

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as against the mortgagee; but there may be cases where, in consequence of the conduct of the mortgagee, notice may become necessary.

But this case differs from all the cases cited; for here the lease is neither prior to the mortgage, nor subsequent to it; but it is in point of law contemporaneous with it; for, though the lease is not in fact made till *September* 1831, nearly a year after the mortgage, yet, as the lease is made under a power, it is referable to the instrument creating the power, and is derived out of it, and has the same effect as if it had been made under the instrument itself.

It is to be considered, in the first place, whether, being made conformable to the power as to the rent and other requisites, it is to be considered as binding on the trustees for the 1000 years, term, so as that they could not disturb the lessee in the enjoyment of the land; and we have no doubt but it is binding on them. They are parties to the deed under which the lease is authorised to be executed; they assent to it and give it confirmation, and therefore they cannot disturb the lessee. They are not indeed entitled to an estate of freehold or inheritance in the technical sense of those terms; but we think the reservation is not to be so confined, but, if they are entitled to the rents, the reservation is sufficient to give them the legal interest in them, and that therefore they may distrain for the rent; and then, they having assigned their legal interest to *John Humphreys*, he may do so also.

But it is alleged for the plaintiff that, even supposing the defendant has otherwise a right to distrain, he is precluded from doing so by treatment of the plaintiff as a trespasser,

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a trespasser, manifested by the trustees, before the assignment to him, having joined with some of the family of the *Rogers*'s in bringing an ejectment for the premises.

The right of entry is however denied by the plaintiff, and the parties are at issue upon it, and the matter is undecided.

There are many cases where the conduct of a party is taken into consideration, where the question is, whether the person against whom he seeks to enforce his claim is to be treated as a person liable upon a contract, or as a trespasser; but here is a lease executed under the seal of the plaintiff, and, as long as he continues in possession, he is liable to the payment of the rent by the usual remedies which the law gives for the recovery of it. If he be actually evicted by a person claiming under a title, or if the lessor, or those claiming under him, or, as in this case, the trustees under the 1000 years' term, had entered upon the plaintiff, that would be a good answer to the avowry; but in the present case there is not even a judgment in the ejectment, but only an action brought. And, there being no eviction, or re-entry, or surrender of the term, the lease is in existence, and there is nothing to prevent the defendant from avowing.

There is a very short abstract of the avowry in the special case (*a*): it is not stated for what length of time the claim is made; but it is to be collected, from the amount found by the verdict, that it is for a year: but this defendant can only claim for half a year; for the

(*a*) The precise words of the abstract are given, ante, page 299.

trustees

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trustees did not assign to him till after half a year's rent had become due.

Judgment to be entered for the defendant, for 75*l.* (*a*)

(*a*) A summons was obtained after term, to shew cause why the rule for judgment should not be amended; and, on the hearing before *Littledale* J. the defendant urged that the rule ought to have been to enter judgment for 150*l.* and not 75*l.* But, it being contended on the other side that the rule of Court could not be altered by a Judge at chambers, *Littledale* J. dismissed the summons. On the first day of *Hilary* term, 1836 (no judgment having been entered up), *Whateley* obtained a rule nisi for amending the rule of *November* 23d, *Littledale* J. observing that, upon reference to the postea and to the statement in the case, there was no doubt that the last-mentioned rule was erroneous as to the sum. In the same term, *January* 28th, *R. V. Richards* shewed cause, and contended that the rule complained of was a judgment of the Court upon the matter submitted to them, and, even if erroneous, could not be altered after the term; and that the delay of the party to enter up judgment on the rule could not enlarge the power of the Court; to this it was answered that, no judgment having been entered up, a mere rule for judgment might, under the circumstances, be altered. *Mellish* v. *Richardson* in error, 7 *B.* & *C.* 819., was referred to.

The Court (Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* Js.) made the rule for amending absolute, on payment of costs.

TIPTON *against* GARDNER.

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On motion for costs under 43 *G.* 3. *c.* 46. *s.* 3., (the plaintiff having arrested for 35*l.* and recovered only 19*l.*) affidavits were put in for the plaintiff, sworn by himself and others, contradicting the evidence given at the trial for the defendant, and impeaching the credit and competency of his principal witness. No motion had been made by the plaintiff for a new trial or to increase the damages.

Held that the verdict was primâ facie evidence of the want of cause for arresting; and that the Court could not try, upon affidavit, whether or not such verdict was well founded.

A RULE nisi was obtained during the present term, on behalf of the defendant in this cause, for costs under stat. 43 *G.* 3. *c.* 46. *s.* 3. The action was brought, and the defendant was holden to bail, for an alleged debt of 35*l.* 12*s.*, for money paid by the plaintiff to the defendant's use. On the trial before Lord *Denman* C. J. at the last *Gloucester* assizes, the defendant's case was a set-off for work done by him as a tailor, and for clothes. The set-off was proved by one *Frances Inch.* The plaintiff had a verdict for 19*l.* 10*s.* In opposition to the rule, the plaintiff put in an affidavit of his own, denying the receipt of more than a small part of the goods mentioned in the particulars of set-off, contradicting the evidence given for the defendant on several other points, insisting that the whole 35*l.* 12*s.* was due, and no part of it yet paid, and stating that *Inch*, who on the trial denied that she was the defendant's partner, and swore that she was his housekeeper only, had in fact been his partner, as appeared by petitions which she and the defendant had respectively filed in the Insolvent Debtors' Court, dated *October* 16th 1835, and which stated the fact of their partnership, as tailors, and in two other trades. The affidavit stated that both the parties had gone to prison for the purpose of taking the benefit of the Insolvent Debtor's act, on the preceding 28th of *September.* The plaintiff's mother also made an affidavit confirming his, in some respects, as to the debt and set-off; and a further affidavit containing similar

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similar allegations was sworn by one *Charles Cue*, who charged the defendant with having taken certain items of the set-off from a ledger in which they had been crossed out as paid. He also alleged that *Inch* had been in partnership with the defendant, but he did not precisely specify the time; and he went into other particulars, impugning the character of *Inch*, and her credit as a witness. There was a fourth affidavit confirmatory of the last, chiefly as to the ledger, and as to the credibility of *Inch*.

Talfourd Serjt. and *Greaves* now shewed cause, and relied upon the facts stated in the affidavits against the rule.

Busby, contrà, relied on *Glenville* v. *Hutchins* (*a*). [Lord *Denman* C. J. Does it appear that Mrs. *Inch* was partner with the defendant as to the debt for tailor's work?] That is not stated. The jury believed her evidence, and no question can now be raised respecting it.

Lord DENMAN C. J. If the facts stated on affidavit for the plaintiff were true, a motion might have been made for a new trial. That has not been done; and the defendant has no opportunity of contradicting these affidavits. *Cue* might have been a witness. The verdict is primâ facie proof of the want of cause for arresting, and must prevail.

(*a*) 1 *B.* & *C.* 91.

PATTESON

PATTESON J. I am of the same opinion. We cannot try this matter again upon affidavits. 1835.

TIPTON *against* GARDNER.

WILLIAMS and COLERIDGE Js. concurred.

Rule absolute.

The KING *against* The Justices of SUFFOLK.

Monday, Nov. 23d.

A RULE nisi was obtained in this term for a mandamus calling upon the above justices to enter continuances, and hear the appeal of the parish officers of *Manningtree* in *Essex*, against an order of two justices for the removal of *Burwell Hunt* and his family from the parish of *St. Margaret*, in the Borough of *Ipswich*, to the parish of *Manningtree*. It appeared that notice of the chargeability was sent by the post, from the parish officers of *St. Margaret* to those of *Manningtree*, on the 18th of *September* 1835, according to stat. 4 & 5 *W.* 4. *c.* 76. *s.* 79. (*a*). On the 9th of *October* the parish

The act for amendment of the Poor Law, 4 & 5 *W.* 4. *c.* 76., does not, in sects. 79 and 81, alter the existing practice of sessions as to the time for giving notice of appeal against orders of removal. It is not necessary, by sect. 79, that notice of appeal should be given within twenty-one days after the notice of removal thereby required; nor, by sect. 81, that notice of appeal should be given fourteen days at least before the sessions.

The statement of the grounds of appeal, required by sect. 81, may be delivered before the notice of appeal. And, if delivered with an erroneous notice of appeal, it is nevertheless available, if a good notice of appeal, incorporating such statement by reference, be afterwards served in proper time.

(*a*) Stat. 4 & 5 *W.* 4. *c.* 76. *s.* 79. enacts, "That from and after the first day of *November* 1834 no poor person shall be removed or removable, under any order of removal from any parish or workhouse, by reason of his being chargeable to or relieved therein, until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy or counterpart of the order of removal of such person, and by a copy of the examination upon which such order was made, shall have been sent, by post or otherwise, by the overseers or guardians of the parish obtaining such order, or any three or more of such guardians, to the overseers of the parish to whom such order shall be directed: Provided

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parish officers of *Manningtree* gave notice to those of *St. Margaret*, that, at the next general quarter sessions to be holden "*in and for the Borough of Ipswich*, in the said county of *Suffolk*," on *Friday* 23d of *October* 1835, they should enter and prosecute an appeal against the said order of removal; and the notice concluded, "the grounds of which said appeal are stated and set forth in the paper writing hereto annexed. Witness," &c. Then followed the signatures of the parish officers: after which came a statement of the ground of appeal (*a*) (viz. settlement of the pauper *B. Hunt* in a third parish by renting a tenement), signed also by the parish officers of *Manningtree*.

On the 13th of *October* (*b*), the officers of *Manning-*

Provided always, that if such overseers or guardians as last aforesaid, or any three or more of such guardians, shall by writing under their hands agree to submit to such order, and to receive such poor person, it shall be lawful to remove such poor person according to the tenor of such order, although the said period of twenty-one days may not have elapsed: Provided also, that if notice of appeal against such order of removal shall be received by the overseers or guardians of the parish from which such poor person is directed in such order to be removed within the said period of twenty-one days, it shall not be lawful to remove such poor person until after the time for prosecuting such appeal shall have expired, or, in case such appeal shall be duly prosecuted, until after the final determination of such appeal."

(*a*) Stat. 4 & 5 *W.* 4. *c.* 76. *s.* 81. enacts, "That after the 1st day of *November* 1834, in every case where notice of appeal against such order shall be given, the overseers or guardians of the parish appealing against such order, or any three or more of such guardians, shall, with such notice, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish a statement in writing under their hands of the grounds of such appeal; and it shall not be lawful for the overseers of such appellant parish to be heard in support of such appeal unless such notice and statement shall have been so given as aforesaid."

(*b*) It was assumed in the argument, though not stated on affidavit, that, by the sessions practice, if not altered by the statute, the notice of appeal, as given, would be regular.

tree

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tree gave another notice to the officers of *St. Margaret*, similar to that of the 9th, except in the following respects. It stated that the appeal would be entered and prosecuted at the next general quarter sessions to be holden "*at* Ipswich, *in and for the said county of* Suffolk," on *Friday*, &c. (as before); and it concluded, "the grounds of which said appeal are stated and set forth in the paper writing delivered on the 9th day of *October* instant. Witness," &c. No further statement was given.

On the 17th of *October*, being five clear days before the first day of the quarter sessions, as prescribed by the rules of the county quarter sessions, the officers of *Manningtree* gave notice to the officers of *St. Margaret* that they should not prosecute the appeal at the ensuing sessions, but should move to have it respited to the following sessions, on account of the illness of a material witness.

The county quarter sessions are holden in four divisions, one of which is the *Ipswich* division, and the sessions for that division are held in the borough of *Ipswich*. By the practice of the Court, appeals against orders of removal are heard in that division only in which the removing parish is situate. *St. Margaret* is in the *Ipswich* division. The officers of *Manningtree* entered the appeal for trial at the sessions holden for the *Ipswich* division on the 23d of *October*, and filed a certificate and affidavit stating the illness of the witness. But the Court refused to entertain the appeal, on the ground that the notice of appeal was informal and defective.

B. Andrews now shewed cause. First, the notice of appeal to the borough sessions was clearly a mistake.

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Rex v. *The Justices of Carmarthen* (*a*), which may be cited, was a distinguishable case from this; and, even if the decision there shewed that the justices of the borough of *Ipswich* might have heard this appeal, still notice of appeal to the borough sessions cannot avail for the purpose of a hearing at the county sessions. Secondly, the notice of appeal to the county sessions was void, inasmuch as it was not given within twenty-one days after the notice of chargeability. The seventy-ninth section of stat. 4 & 5 *W.* 4. must have been intended to enforce this. The object was to prevent the pauper's being bandied from place to place while the settlement was in litigation; and therefore it is enacted that, if notice of appeal be received within the twenty-one days, the pauper shall not be removed till the appeal is determined, or the time for appealing expired, but that the pauper may be removed within the twenty-one days, if, during that time, the parish to which he is removed signifies its acquiescence. If notice of appeal might be given after the twenty-one days had elapsed, the evil which the statute was intended to meet would be still unremedied. And, further, the eighty-first section requires that a statement of the grounds of appeal be sent or delivered with the notice of appeal, or fourteen days at least before the first day of the sessions. Then the notice of appeal must be given fourteen days before the sessions; for it would be absurd to say that the grounds of appeal should be stated before there is notice of appeal. [*Coleridge* J. You say that the statute introduces a general alteration in sessions practice. When do you say the notice ought now to be given?] Formerly the

(*a*) 4 *B.* & *Ald.* 291.

reason-

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reasonableness of notice was left to be decided by the justices at sessions (*a*); the present act gives no precise direction; but it is enough to say that the notice must be at least fourteen days before the sessions. [*Patteson* J. If the twenty-one days mentioned in sect. 79. ended within less than fourteen days of the sessions, the appellants might give notice within the twenty-one days, and yet not be in time to appeal.] They would have time till the next sessions. Sect. 79. is clear as to the necessity of notice within the twenty-one days, and sect. 80. enacts that the officers of the parish giving *such notice of appeal*, shall, until the appeal is decided, have access to the pauper for the purpose of examining him as to his settlement. As this regulation was evidently intended to be general, the legislature must have contemplated that the giving of *such notice* was likewise to be the rule for all cases.

Thesiger, contrà. The notice for the borough sessions was improper, as the appeal could not be heard there, since stat. 8 & 9 *W.* 3. *c.* 30. *s.* 6. But the sessions in question were held in the borough, and the right day was mentioned in the notice; the respondents, therefore, could not be misled, and that notice was sufficient. It may be admitted, that *Rex* v. *The Justices of Carmarthen* (*b*) is a distinguishable case, because the borough justices there had a jurisdiction within stat. 8 & 9 *W.* 3. *c.* 30. *s.* 6. But, supposing that the first notice was insufficient, that of *October* 13th is good. There is nothing in any reasonable construction of the present statute to narrow the time which parties formerly had for giving

(*a*) Stat. 9 *G.* 1. *c.* 7. *s.* 8. (*b*) 4 *B.* & *Ald.* 291.

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notices of appeal. (He was then stopped by the Court.)

Lord DENMAN C. J. I am of opinion that this enactment was not meant to interfere with the practice as to the time of giving notice of appeal. If that had been intended, it would have been expressed. I think that the practice of sessions remains, in this respect, as it was before, notwithstanding the act. Then, as to the statement of the grounds of appeal, in this case it was delivered, with the notice of appeal, on the 9th of *October*. The notice was wrong; but the statement delivered with it was available to all purposes. The rule must be absolute.

PATTESON J. I am of the same opinion. It is clear that a statement of the grounds of appeal was delivered with the notice of the 9th of *October*. If it is an absurdity that the statement of grounds may be served before the notice, that absurdity is introduced by the act itself.

WILLIAMS J. An effective notice of the grounds of appeal was given on the 9th of *October;* and there was, afterwards, a timely notice of trying the appeal. The practice, as to that, stands as it did before the act passed.

COLERIDGE J. It is admitted that no sufficient notice of appeal was given within the twenty-one days. Then the question is, whether notice within that time is peremptorily required by sect. 79 of the statute. I think the section was not intended to operate to that extent. The

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The mischief which it was meant to remedy was, that de facto removals were made, before it could be known whether or not the removal was well grounded or would be opposed; and in such cases it ultimately perhaps turned out that the pauper was not settled in the place to which he was removed. The statute, therefore, says that no person shall be removeable until twenty-one days after notice shall have been sent to the parish to which the removal is made; but not that there shall be no appeal unless notice of it be given within that time. Then as to the effect of sect. 81. We are called upon to make a general alteration of practice at sessions upon a mere implication. The section enacts that a statement of the grounds of appeal shall be sent or delivered with the notice, or fourteen days at least before the first day of the sessions; and therefore it is contended that the notice must be given fourteen days before the sessions. But the statute itself does not prescribe that, or any time. I asked, when this proposition was stated, "What time do you say is now fixed for notice of appeal against orders of removal throughout the country?" and no answer was given. The meaning of the clause is that, where the practice of sessions requires more than fourteen days' notice of appeal, the statement of grounds of appeal may be delivered with the notice, or within not less than fourteen days of the sessions; but that, at all events, it must be delivered at least fourteen days before the sessions.

Rule absolute.

Monday, Nov. 22d.

ALLENBY *against* PROUDLOCK and STOKER.

In trespass quare clausum fregit, defendant pleaded to the whole action, (1.) Not guilty; (2.) Soil and Freehold; (3.) Private right of way; (4.) Public right of way. By order of Nisi Prius, the cause was referred to a barrister, the costs to be in his discretion, and to be recovered as if they were costs in the cause. The fourth issue was withdrawn from the cause by consent; but the arbitrator was to decide on the costs of the cause as if it had remained. The arbitrator awarded that the verdict on the first and second issues should be entered for the plaintiff, with nominal damages, and the third for the defendant; and that the plaintiff should pay the defendant his costs in the cause, such payment to be made on the expiration of fourteen days from the taxation.

TRESPASS quare clausum fregit; the declaration bearing date before the first day of *Easter* term, 4 *W.* 4. Pleas (to the whole action), first, not guilty; secondly, that the locus in quo was the soil and freehold of the defendant *Proudlock*, wherefore he, in his own right, and *Stoker* as his servant, &c.; thirdly, a similar justification under a right of way in the defendant *Proudlock*, in respect of a close in his occupation; fourthly, that the locus in quo was a public highway. The replication joined issue on the first plea, and traversed the matter of the three other pleas, on which traverses the defendants joined issue. On the trial before *Taunton* J., at the *York* Spring assizes, 1834, the cause was referred to a barrister, with power to order a verdict for the plaintiff, or a nonsuit, or a verdict for the defendant; but the fourth plea was withdrawn by consent. The arbitrator was to have power to direct what should be done by either party, and what road the defendant *Proudlock* should have. The costs of the cause, and of the reference, were to be in the discretion of the arbitrator, who was also to hear, and decide on the costs of the cause, as if the fourth plea remained. The costs awarded by the arbitrator were to be taxed by the proper officer, and to be recovered, if necessary, as if they were costs in the cause. The arbitrator awarded

Held, that the plaintiff was entitled to his costs on the first and second issues, and that each party was to bear his own costs of the fourth issue; the award being tantamount to a direction that the costs in the cause should abide the event of the cause.

that

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that a verdict should be entered for the defendants on the third issue; and for the plaintiff on the first and second issues, with 1*s.* damages on each; and that the plaintiff should pay the defendants their costs in the cause, and the costs of the reference and award, to be taxed by the proper officer; such payment to be made on the expiration of fourteen days from the taxation thereof. The award then directed that *Proudlock* should have a road, described in the award, in respect of his close named on the third plea.

The postea was drawn up for the plaintiff on the first two issues, with 1*s.* damages on each, and for the defendants on the third issue; the fourth issue was not noticed.

The defendants, on going before the Master to tax their costs, contended that the award entitled them to the costs of all the issues as costs in the cause, notwithstanding the finding for the plaintiff on the first and second issues. But the Master was of opinion that they should be apportioned, according to *R. Hil.* 2 *W.* 4. I. 74. (*a*), and *R. Hil.* 4 *W.* 4. *General Rules and Regulations*, 7. (*b*). For the purpose, however, of his receiving the direction of the Court, *Alexander* obtained a rule in this term (*November* 3d) calling upon the plaintiff to shew cause why the postea should not be amended pursuant to the award, or why it should not be referred to the Master to tax the defendants their general costs under the award.

Cresswell now shewed cause. The costs should be apportioned, the plaintiffs being allowed those of the

(*a*) 3 *B.* & *Ad.* 385. (*b*) 5 *B.* & *Ad.* iv.

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left to pay his own costs of this issue. Then, as to the costs of the cause, we think that the Master should allow them to the plaintiff on the two issues found for him; and to the defendants on the third; for in our opinion the arbitrator's meaning was, that the defendants should have the costs in the same way as they would have had them if the issues had been similarly found on a trial.

PATTESON J. The arbitrator had absolute power. If he meant the plaintiff or defendants to have the costs of the fourth issue, he should have said so. I think, therefore, that, as to this issue, we must leave each party to bear his own costs. As to the issues found against the defendants, he meant the plaintiff to have the costs of them; for he leaves the defendants to their costs in the cause.

WILLIAMS and COLERIDGE Js. concurred.

Referred to the Master to tax the plaintiff his costs of the first and second issues; and to tax the defendants their costs of the third issue; and ordered that the Master disallow to either party the costs of the fourth issue: and, further, that no costs be allowed to either party of this application.

MOSCATI *against* LAWSON.

Monday, Nov. 23d.

On a trial in the Exchequer, a juror was withdrawn by consent. Afterwards plaintiff sued defendant in this Court for the same cause of action. This Court stayed the proceedings as being contrary to good faith.

Although the plaintiff, who had conducted the first cause for himself, and was not a lawyer, deposed that he did not know that the arrangement would debar him from bringing a second action.

THE plaintiff declared against the defendant, in the Court of Exchequer, for publishing a libel concerning him, to which the defendant pleaded a justification. The cause was tried in *February* last, at *Westminster*, before *Alderson* B. The plaintiff, who was not a lawyer, conducted his own cause. The publication was proved; and the defendant called evidence in support of his plea. The plaintiff then commenced his reply, in the course of which the learned judge suggested that a juror should be withdrawn, to which both parties agreed. Nothing was said as to another trial, or a fresh action. Subsequently the plaintiff commenced, in this Court, a fresh action against the defendant, for the same publication. In this term, Sir *John Campbell*, Attorney-General, obtained a rule calling on the plaintiff to shew cause why the proceedings should not be staid, on the ground that the action was brought contrary to good faith. In opposition to the rule, the plaintiff made affidavit that, when he consented to withdraw a juror, he did not understand that the arrangement would debar him from bringing a fresh action.

Sir *F. Pollock* and *Petersdorff* now shewed cause against the rule, which was supported by Sir *John Campbell*, Attorney-General, and *Platt*.

Lord DENMAN C. J. This rule must be made absolute. A party who consents to such an arrangement is bound

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MOSCATI *against* LAWSON.

bound by it: he should take care to have the effect of it explained to him before he enters into it.

PATTESON, WILLIAMS, and COLERIDGE Js., concurred.

Rule absolute.

Monday, Nov. 23*d.*

BIDDLECOMBE *against* BOND.

Defendant gave a warrant of attorney to plaintiff to secure the payment of a debt by instalments. Shortly before the first instalment was due, defendant told plaintiff that he feared he could not meet it, and that, unless time was given him, he would make over his effects for the benefit of his creditors. An agreement was then entered into between plaintiff and defendant, that defendant should give his acceptance for a part, and pay the rest by instalments according to his ability, so as to discharge all before *April* 1st, 1836; and that plaintiff should not enter up judgment unless defendant should dispose of his business or *become bankrupt or insolvent*.

Defendant paid the acceptance when due. Afterwards, and before *April* 1st, 1836, defendant asked plaintiff to make him a bankrupt, in order to relieve him from his difficulties, and said that he could not pay 20*s.* in the pound, and that his assets were 200*l.*, and his debts 300*l.*

Held, that plaintiff might enter up the judgment and take out execution, defendant appearing to be insolvent in the sense contemplated in the agreement: and that the facts above stated did not shew that plaintiff, at the time of the agreement, knew defendant to be insolvent in that sense.

The expression "becoming insolvent" means a general inability to pay debts, and does not signify taking the benefit of the Insolvent Debtors' Act, unless the context so restrains it.

THE defendant gave the plaintiff a warrant of attorney to confess judgment, with a defeazance, stipulating for the payment of 170*l.* by three equal instalments on certain days. Shortly before the first instalment became due, the defendant informed the plaintiff that he feared he should not be able to meet it, and that, unless the plaintiff gave him farther time, he would make over his effects for the general benefit of his creditors. It was then agreed that the defendant should give the plaintiff his acceptance for 30*l.* at three months, which was done, and a written agreement was signed by the two parties, whereby, after reciting the giving of the warrant of attorney to secure

170*l.*,

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BIDDLECOMBE *against* BOND.

170*l.*, it was agreed that, in consideration of 30*l.* to be paid by the defendant to the plaintiff in pursuance of his acceptance, and of his agreeing to pay the further sum of 26*l.* on or before the 29th of *September* then next, and the remainder of the debt by instalments of various small sums according to his ability, so that the whole should be discharged on or before *April* 1st, 1836, the plaintiff should not enter up judgment on his warrant of attorney, unless the defendant should in the mean time have disposed of his business, or unless he should "have become bankrupt or insolvent;" but otherwise it should remain in full force. This agreement was executed *March* 30th, 1835. The defendant paid the 30*l.* on his acceptance.

About the end of *June* 1835, the defendant requested the plaintiff to make him a bankrupt, in order to relieve him from his difficulties; and, a few days after, the defendant, being asked by the plaintiff how much in the pound he could pay if he compounded with his creditors, said that 20*s.* in the pound was out of the question; that his stock and book debts amounted to about 200*l.*, and that he owed full 300*l.*; and he then again urged the plaintiff to make him a bankrupt. On the 7th of *July*, the plaintiff caused judgment to be entered up; and a writ of fieri facias issued on the same day, under which the sheriff made a levy on the 8th of *July*.

The defendant then applied to *Williams* J., at chambers, to have the judgment and execution set aside for irregularity, upon his affidavit, in which, after setting forth the warrant of attorney and the agreement, he deposed that he had paid his acceptance at maturity, that he had not, since the date of the agreement, disposed of his business, become bankrupt, applied for or obtained the

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the benefit of any act for the relief of insolvent debtors, or made a declaration of insolvency in the *London Gazette*; that he had not made any composition with his creditors, or assignment for their benefit of his goods and effects, nor, to the best of his knowledge, done any other thing whatsoever that would denote or imply that he had not the means of paying and discharging his just debts; and that, according to the best of his knowledge and belief, his pecuniary circumstances and credit were at the time of the issuing of the writ in a better state than at the date of the agreement. In answer, the plaintiff made affidavit of the facts before mentioned. The learned Judge ordered the judgment and execution to be set aside for irregularity. In this term, *Erle* obtained a rule to shew cause why the order should not be set aside.

Hodges now shewed cause on affidavits setting out the facts before stated. The execution issued contrary to good faith. It can be supported only by contending that the plaintiff was insolvent. But, first, it does not appear that any creditor was pressing the defendant, and the plaintiff could not claim his debt till the 1st of *April* 1836: therefore the defendant's inability to satisfy all his creditors at any precise moment was not an insolvency. In *Bayly* v. *Schofield* (*a*) it was held that a party was in insolvent circumstances within the meaning of stat. 19 *G.* 2. *c.* 32. *s.* 1., who, at a meeting of his creditors, after a commission of bankruptcy had been sued out against him, was found to be unable to answer the demands then due; and *Bayley* J. said that insolvency "means that a trader is not able to keep his general

(*a*) 1 *M.* & *S.* 338.

neral days of payment." But that is not the case here. So in *Cutten* v. *Sanger* (*a*) *Alexander* C. B. held, as to the meaning of the word "insolvent" in stat. 6 *G. 4. c.* 16. *s.* 73., "that notice of a difficulty to meet particular demands only, is not notice of insolvency; but it must be of a more general and extensive description, a general composition, as in *Reader* v. *Knatchbull* (*b*), or what is said to resemble a composition, the paying every creditor a little as it came to hand, as in *Bailey* v. *Schofield* (*c*)." This case stops very far short of such circumstances. Secondly, the insolvency here was at any rate not more complete at the time of the execution, than it was, with the knowledge of the plaintiff, at the time of the agreement; for the defendant then informed the plaintiff that he could not meet this instalment on the warrant of attorney. But, thirdly, the word "insolvent," as used in this agreement, must mean more than inability to satisfy debts. The words are "bankrupt or insolvent;" and this combination of expressions gives a technical effect to the word "insolvent;" it must mean, taking the benefit of the act. In the Friendly Society Act, 33 *G.* 3. *c.* 54. *s.* 10., there is an enactment in case of persons entrusted with money, &c. dying, or becoming "bankrupt or insolvent;" and Sir *L. Shadwell*, Vice-Chancellor, held, in *In re Birmingham Benefit Society* (*d*), that what the legislature there meant by the term "insolvent," was, not a person who had made a mere assignment for the benefit of his creditors, but a

(*a*) 2 *Y.* & *J.* 459. See p. 469.

(*b*) Cited in note (*a*) to *Tooke* v. *Hollingworth*, 5 *T. R.* 218.

(*c*) 1 *M.* & *S.* 338.

(*d*) 3 *Sim.* 421. The section there referred to speaks of acts to be done, in such event, by the party's executors, administrators, or *assignees*, only, not by the person himself.

person

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person who had taken the benefit of an Insolvent Debtors' Act. That case goes beyond the present. It is true that in *Parker* v. *Gossage* (*a*) the Court of Exchequer interpreted the expression to mean a general inability to pay debts; but there the question was, whether the Court would compel a party to supply goods to one who was unable to pay: under such circumstances, it was proper to give a wide interpretation to the expression. In *Reader* v. *Knatchbull* (*b*) it was held, on similar grounds, that an inability to pay for goods was such an insolvency as discharged a party from an agreement. That principle is totally inapplicable here. [Lord *Denman* C. J. The opinion of *Parke* B. in *Parker* v. *Gossage* (*a*) was, that the word "insolvency" was to be interpreted as meaning general inability to pay, unless the context suggested a different interpretation: but you resort, not to the context, but to the situation of the parties.]

Erle, contrà. There is no pretence for saying that the plaintiff, at the time of the agreement, knew of the defendant's insolvency. He merely knew that he did not expect to be able to meet the approaching instalment. But the Defendant might, before the time came, provide funds; and might be solvent on a balance of all his assets against all his debts. The insolvency contemplated by the agreement could not be taking the benefit of the Act for the Relief of Insolvent Debtors; for, if the defendant took the benefit of the act, no execution of the warrant, levied after the com-

(*a*) 2 *C. M. & R.* 617. *S. C.* 1 *Tyrwh. & Granger*, 105.
(*b*) Cited in note (*a*) to *Tooke* v. *Hollingsworth*, 5 *T. R.* 218.

mencement

mencement of his imprisonment, would be available, by stat. 7 *G.* 4. *c.* 57. *s.* 34. Then the conversations, after the agreement, shewed the defendant at that time to be insolvent in the general sense, although not so with reference to the statute; and the plaintiff had a right, according to the agreement, to issue execution.

Lord DENMAN C. J. It is contended that the word "insolvent," as used in the agreement, must be restrained to such an insolvency as would be shewn by the party taking the benefit of the Act for the Relief of Insolvent Debtors, inasmuch as the word occurs in company with "bankrupt." We cannot so restrain it. But then it is contended that the plaintiff, at the time of the agreement, knew that the defendant was in insolvent circumstances, in the wider sense. We think that does not appear: it does not follow, from any thing which took place, that the plaintiff believed that the defendant would be ultimately unable to satisfy the demands against him: and such a belief would, indeed, be inconsistent with the plaintiff's conduct. The agreement has therefore not been violated, and the rule must be made absolute.

PATTESON J. I am of the same opinion. It would require a very strong case to shew that the meaning of the word was restrained to taking the benefit of the act. If the context does not shew something to induce us to put such an interpretation on the word, we must hold it to be intended of a general inability to pay debts.

WILLIAMS J. concurred.

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COLERIDGE J. I am of the same opinion. The burthen of proof is on the defendant, who owes money for which he has given a warrant of attorney, and seeks to preclude the plaintiff from the ordinary remedy. If he can oust the plaintiff from that remedy, he must do it by shewing that the proceeding is contrary to good faith. The word "insolvent" may have the general meaning which the plaintiff seeks to give it: the defendant is to shew that it cannot have that meaning, which he has not done.

Rule absolute (*a*).

(*a*) As to insolvency, with reference to stat. 19 *Eliz. c. 5.*, see *Shears* v. *Rogers*, 3 *B. & Ad.* 362.

Tuesday, Nov. 24th.

SHIRREFF Gent., One, &c. *against* Dame MARIA ELIZABETH GRESLEY.

An attorney's bill was referred to taxation by a Judge of the Court of Common Pleas, who directed that the rule should not be acted upon till the attorney should have had time to make a certain motion to that Court. The motion was disposed of; and, on the second day afterwards, the client not having proceeded with the taxation, the attorney arrested her for the alleged amount of the bill. A Judge of the Court of King's Bench, on summons, set aside the proceedings and discharged the defendant out of custody, with costs, ordering the plaintiff also to pay the costs of the summons. Held that the discharge was right; and the Court would not review the order as to costs.

In discharging the rule for rescinding the Judge's order, it was made a condition that the defendant should not prosecute an action for a malicious arrest. Afterwards, the attorney's bill was taxed, and the balance due to him found to be only 369*l.*, he having arrested for 800*l.* The Court, on motion, refused to release the defendant from her undertaking not to prosecute the action.

Semble that, if a client obtain an order for taxing an attorney's bill, and take no further step for several weeks, the attorney cannot treat the order as waived, and arrest, but should himself cause the bill to be taxed, before proceeding against the client.

THE plaintiff having done business as an attorney for the defendant, his bills of costs, &c., were, by an order of *Gaselee* J., *May* 23d, 1835, referred to the prothonotary of the Court of Common Pleas to be taxed; but it was made part of the order that the taxation should not be proceeded in for ten days, to give the plaintiff an opportunity of moving the Court of

Common

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Common Pleas to set the order aside, unless a certain undertaking should be entered into. A rule nisi was obtained in that Court accordingly on the 2d of *June*, but was discharged on the 17th. On the 19th of *June*, the defendant had not proceeded in the taxation of the bills (which were very voluminous) nor been requested to do so by the plaintiff. On that day the plaintiff sued out process of the Court of King's Bench, upon which the defendant was arrested for 800*l.*, the claim indorsed on the writ being for 916*l.* On the 23d of *June*, *Patteson* J., on summons taken out for the defendant, and on hearing the parties by counsel, ordered that the capias, and all subsequent proceedings, should be set aside with costs, and the defendant discharged out of custody, and that the plaintiff should pay the costs of that application. Upon the hearing, *Steventon* v. *Watson* (*a*) was cited for the plaintiff; but the learned Judge held that case to be no authority against the present application; he observed also, that in *Steventon* v. *Watson* (*a*) no notice appeared to have been taken of stat. 2 *G.* 2. *c.* 23. *s.* 23., which, after providing for the reference of an attorney's bill to taxation, says, "pending which reference and taxation no action shall be commenced or prosecuted touching the said demand." On the 11th of *September* the defendant sued out a writ against the plaintiff for a malicious arrest.

Knowles, in the present term, moved for a rule to shew cause why the order of *Patteson* J. should not be rescinded. He relied upon *Steventon* v. *Watson* (*a*), and contended that the words of stat. 2 *G.* 2. *c.* 23. *s.* 23.

(*a*) 1 *B.* & *P.* 365.

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pointed to a taxation immediately following the reference, and that, if the taxation were not immediately proceeded with, an action might be commenced on the bill. The Court (*a*) granted a rule nisi, *Patteson* J. observing that, when *Steventon* v. *Watson* (*b*) was mentioned before him, he thought it not law for the purpose for which it was cited, and should have considered it very hard that, from any delicacy on his part as to that case, the party should be kept in custody through the long vacation.

Whateley now shewed cause. The question is, under stat. 2 *G.* 2. *c.* 23. *s.* 23., whether the "reference and taxation" were "pending," in this case, when the arrest took place. It was contended before *Patteson* J. that the order for taxation was, in effect, abandoned, by reason of the lapse of time, during which no step was taken by the client: but the learned Judge did not assent to that argument, and therefore it became unnecessary to call his attention to the fact that the chief delay was owing to the suspension procured by the plaintiff himself. [*Patteson* J. It appears, by reference to the dates, that the point which I had thought the principal one, namely, whether the delay amounted to an abandonment of the order by the client, did not arise. I thought that, even if the interval had been considerable, the client did not, by omitting to proceed, abandon the order; but that the attorney, in that case, ought to proceed with the taxation. And the Master confirms that opinion.] In fact, however, the plaintiff's rule was discharged on the 17th of *June*, and

(*a*) *Patteson*, *Williams*, and *Coleridge* Js. (*b*) 1 *B.* & *P.* 365.

the

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the writ issued on the 19th. [*Knowles*, contrà, said he should contend that a delay of three days was a waiver. Lord *Denman* C. J. We should require strong authority for that.] *Steventon* v. *Watson* (*a*) was no authority for the plaintiff, nor was it rightly decided. The Court of Common Pleas there held that the party whose bill was under taxation in the Court of King's Bench had nevertheless his remedy by law upon the bill, in the Common Pleas. On reference to the stat. 2 *G.* 2. *c.* 23. *s.* 23., it would have appeared that he had no such remedy, pending the taxation. That was admitted in *Hewitt* v. *Bellott* (*b*), where the action was brought in the King's Bench upon a bill which had been referred to taxation by the Vice-Chancellor.

Knowles, contrà. The right of bringing an action is not to be taken away without an express legislative provision. Here the enactment evidently contemplates an immediate proceeding by the client who obtains a reference to taxation. And it would be very hard on the attorney if he could postpone it indefinitely. [*Patteson* J. Why cannot the attorney himself go on with the taxation ? The legislature seems to contemplate his doing so, if necessary, by the provision made in sect. 23 for proceeding ex parte.] It is not to be expected that the attorney should take the steps for lessening his own bill. [Lord *Denman* C. J. If he will not, he must not bring an action.] In *Hewitt* v. *Bellott* (*b*) *Abbott* C. J. said that, if the attorney could not sue upon his bill while costs of taxation were unpaid, the client might delay him indefinitely by omitting to demand them. There

(*a*) 1 *B.* & *P.* 365. (*b*) 2 *B.* & *Ald.* 745.

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an answer might have been given like that suggested here; that the attorney might proceed by tendering the costs. In general, an order at chambers is considered as waived, if not drawn up and served within a day: here is a delay of three days. The stat. 2 G. 2. c. 23. s. 23. must have been the ground of the motion in *Steventon* v. *Watson* (a); it does not appear that there could be any other. At all events the Court will not enforce this order as to payment of costs by the plaintiff, since he was misled by a reported case. A Judge at chambers may give costs; but the rule is, that the power be only exercised in extreme cases; per *Taunton* J., *In the Matter of Bridge and Wright* (b). This is not one. And, if the order be kept in force, it should be on condition that the defendant do not prosecute her action against the plaintiff.

Lord DENMAN C. J. This is not the mere case of an action commenced pending taxation, as in *Steventon* v. *Watson* (a); but the plaintiff here, by his own act, procures the taxation to be suspended by a rule of the Court of Common Pleas; and as soon as that rule is discharged, without giving any notice to proceed with the taxation, he arrests the defendant. The question, however, is, whether *Steventon* v. *Watson* (a) be law or not: I think that it does not truly expound the statute, but contravenes its very terms, and therefore is not law. The rule must be discharged as to setting aside the order. As to costs, I think that the plaintiff, having had full notice at chambers of the learned Judge's opinion as to *Steventon* v. *Watson* (a),

(a) 1 *B. & P.* 365. (b) 2 *A. & E.* 48.

but

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but having taken the chance of a decision upon it here, must abide the result of our opinion. And, with respect to the costs at chambers, considered as a distinct matter; the Court would be very unwilling to interfere with the discretion of a Judge at chambers on that subject; and this is not a case calling upon us to do so. I think, however, that it should be a condition of discharging the rule, that the defendant do not proceed with her action.

PATTESON J. The rule to shew cause was not granted on account of any doubt as to the case of *Steventon* v. *Watson* (*a*); because it is clear that the Court of Common Pleas there proceeded, not on a consideration of the stat. 2 *G.* 2. *c.* 23. *s.* 23., but upon the opinion that, as they could not attach for proceedings which were in contempt of the order of another Court, they could not stay the proceedings. But, when the motion was made here, we all thought that there had been an interval of several weeks between the order for taxation and the arrest, and that a question might be raised whether or not the order had been waived; and on that account the rule was granted (*b*).

Rule discharged with costs, the defendant undertaking not to prosecute her action further.

The bills were afterwards taxed, and the balance thereupon found due to the plaintiff was only 369*l.* 5*s.* 2*d.*, which the defendant paid. The costs given by the above rule, and at chambers, were tendered to the defendant by the plaintiff, but not accepted. In *Hilary*

(*a*) 1 *B.* & *P.* 365. (*b*) *Williams* and *Coleridge* Js. were absent.

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SHERIFF *against* Lady GRESLEY.

term 1836, a rule nisi was obtained for discharging so much of the above rule as contained an undertaking by the defendant not to prosecute her action against the plaintiff. In the following *Easter* term, *May* 7th,

Knowles shewed cause, and contended that the rule could not be opened upon affidavits suggesting new matter; he cited *Davies* v. *Cottle* (*a*) and *Phillips* v. *Weyman* (*b*), and contended that to grant the present rule would be a hardship on the plaintiff, who had been misled by *Steventon* v. *Watson* (*c*). [*Patteson* J. He misunderstood that case. It was not under similar circumstances.]

F. Pollock and *Whateley*, contrà, relied upon the great difference between the sum for which the plaintiff had arrested, and that allowed on taxation; and contended that this rule ought to be made absolute, since it was impossible to know, when the former rule was made, that so great a sum would be deducted from the bills of costs.

Lord DENMAN C. J. The rule must be discharged. Our impression is that the rule to shew cause ought not to have been granted.

LITTLEDALE J. concurred.

PATTESON J. It is far best that there should be a broad line drawn in these cases (*d*).

Rule discharged.

(*a*) 3 *T. R.* 405. (*b*) 2 *Chitt. Rep.* 265.
(*c*) 1 *B. & P.* 365. (*d*) *Coleridge* J. had left the Court.

LANCASTER *against* HEMINGTON.

Tuesday, Nov. 24th.

An action on the case against an attorney, for negligently preparing a conveyance of land to the plaintiff, was referred to an arbitrator with all matters in difference. The plaintiff's case on the reference was, that many words in the deed were written on erasures, which were not noticed in the attestation; that the deed was in other respects incorrect and improperly prepared; and that, by reason thereof, the plaintiff was prevented from mortgaging. The arbitrator ordered a verdict to be entered for the defendant, and awarded that it was proved before him that the erasures in the conveyance mentioned in the pleadings, were made before the deed was executed.

THIS was an action on the case against the defendant for not having, as an attorney employed by the plaintiff, used due or proper skill and care in preparing a conveyance, from one *Tranter* to the plaintiff, of certain lands in the pleadings mentioned. At the *Warwick* assizes a verdict was taken for the plaintiff, subject to a reference as to the verdict and all matters in difference.

The arbitrator made his award of and concerning the matters referred, as follows. "I do order and direct that the verdict and damages entered for the plaintiff in the said action be set aside, and that the verdict in the said action shall be finally entered for the defendant; and I do adjudge, award, and declare, that it was proved before me, that all the erasures and interlineations appearing in the said conveyance in the pleadings in the said action mentioned, and which bears date on the 5th day of *April*, 1826, were made before the said conveyance was executed by any of the parties thereto, and before livery of seisin of the land thereby conveyed was made." (Then followed a direction as to the costs of the reference, which were in the arbitrator's discretion.) "And I do declare that no other matter was agitated by the said parties in difference before me, than the matter in difference in the said action. In witness," &c.

On motion to set aside the award, on the ground that the facts therein stated did not warrant a finding for the defendant:

Held, that the above statement of fact by the arbitrator did not shew that his decision proceeded on that fact; and, therefore, that no ground appeared for reviewing his award.

A rule

1835.

LANCASTER against HEMINGTON.

A rule nisi was obtained in this term for setting aside the award, on the ground "that the facts found by the arbitrator in his award are not sufficient to warrant a finding for the defendant; and that it appears from the said award that the arbitrator mistook the question referred to him." In support of this rule, the attorney who attended the reference for the plaintiff swore that he on that occasion produced the deed of *April* 5th to the arbitrator, and pointed out to him many words written on erasures (besides interlineations) without any notice in the attestation; that the land, which was conveyed as three pieces, was incorrectly described in the habendum and indorsement of livery of seisin as one plot only; that, independently of the interlineations and erasures, the deed was not a proper conveyance; and that, by reason of its being improperly prepared, the plaintiff, before he could effect a mortgage, was obliged to procure another conveyance from *Tranter*. The affidavit further set out some alleged circumstances of suspicion, with respect to the execution of the deed: and it stated that the plaintiff's case before the arbitrator rested, not merely upon the erasures having been made at any particular time, but upon the deed being so negligently and unskilfully prepared, and of such a suspicious appearance, that no one could be advised to act upon it.

Goulburn Serjt., now shewed cause. The arbitrator has, in general terms, awarded a verdict to be entered for the defendant. The award does not shew that the only fact considered by the arbitrator was that of the erasures being made before or after execution of the deed; and to go into any of the other facts would be reviewing

reviewing the case upon the merits. The Court then called upon

Waddington, contrà. The whole context of the award shews that the fact found by the arbitrator was the ground of his decision. He was not called upon to state any fact. The award, in speaking of erasures in the conveyance, refers to the pleadings; the Court, therefore, will look at the pleadings, and see how the fact found bears upon the question raised by them.

Lord DENMAN C. J. I think not. Supposing that the arbitrator has mistaken the law, he has stated nothing on his award which shews him to have done so. Some of the parties may have wished, for the sake of character, that he should give his opinion as to the erasures. He was not bound to state any thing on that subject; but I think we are not called upon to say that his finding of a particular fact shews that he made it the ground of his decision. Then, if there has been any mistake, it is one which we cannot arrive at without going into the merits. The rule must be discharged.

WILLIAMS and COLERIDGE Js. (*a*) concurred.

Rule discharged.

(*a*) *Patteson* J. was in the Bail court.

Tuesday, Nov. 24th.

DOE on the Demise of WILLIAM REES *against* THOMAS and BEVAN.

A. and *B.* jointly brought two ejectments on the same title, one against *C.* and the other against *D.*, and recovered in both. In a third, brought by *A.* and *B.*, on the same title, against *C.* and *D.*, the defendants had a verdict, and taxed their costs, but never made any express demand of them. The costs were never paid. Four years after the trial of the third cause, *B.* released to *C.* and *D.* his claim to the premises in dispute, in consideration of money, and of a covenant by *C.* and *D.* to suspend their claim against *B.* for costs. Afterwards *A.* died; and his son brought ejectment against *C.* and *D.* on the title relied upon in the former actions.

A RULE nisi was obtained in this term for a stay of proceedings in the above action until payment, by the lessor of the plaintiff, of 1198*l.* 17*s.* 8*d.*, the costs of certain former actions of ejectment. The facts stated as ground for the rule were as follows: — In 1821, *William Rees*, father of the lessor of the plaintiff, and *David Terry*, brought several ejectments in the Court of great sessions for *Glamorganshire* for premises in that county, to some of which actions the now defendant *Thomas* appeared and pleaded, to others the now defendant *Bevan*, and to one of which both appeared and pleaded. In one of the actions, defended by *Thomas*, the plaintiff had a verdict at the great sessions in the Autumn of 1821. A rule nisi was obtained for a new trial; but five of the other actions (which stood as remanets) having been consolidated by consent of *William Rees* and *Terry*, and of *Thomas* and *Bevan*, it was agreed between the same parties respectively that the action in which the rule nisi was obtained should be considered as sent by the Court to a new trial, and should be consolidated with the other five. At the Spring great sessions, 1823, the action with which the others had been so consolidated was tried; the defendants had a verdict, and their costs were taxed at 1198*l.* 17*s.* 8*d.*, which sum has never been paid. In *November* 1823, *William Rees* and

Upon motion to stay proceedings till payment to *C.* and *D.* of the costs recovered by them:

Held, that the facts of this case did not take it out of the ordinary rule, and that the defendants were entitled to the stay of proceedings.

Terry

1835.

Doe dem. Rees *against* Thomas.

Terry brought an ejectment in the Court of King's Bench for premises in respect of which the consolidated actions had been brought; and *Thomas* and *Bevan* appeared as landlords. In the ensuing *Hilary* term, the Court was moved to stay proceedings in this ejectment till the above-mentioned costs should be paid; and the matters of the rule were referred to the Master. (The ultimate result did not appear (*a*).) In 1824, *Terry* brought other ejectments in the court of great sessions and Court of King's Bench for premises which had been in question in the consolidated actions. In each of these ejectments, *Thomas*, *Bevan*, and one *David Williams*, appeared and defended; and proceedings were stayed by the respective courts, till the above-mentioned costs should be paid. In *June* 1828, *William Rees* died, leaving the present lessor of the plaintiff his eldest son and heir at law; and he, *May* 1835, brought the present and other actions of ejectment, for premises, the recovery of which had been attempted in the consolidated actions above-mentioned. The now lessor of the plaintiff sued upon his father's title.

An affidavit in answer made by *Thomas Rees*, a son of *William Rees*, father of the lessor of the plaintiff, stated that *William Rees* the father had claimed as heir at law of *William Rees* of *Court Colman*, who died leaving certain estates. That *William Rees* the father, and *Terry*, who was then supposed to have also some title, brought an ejectment, which was defended by *Bevan*, for a portion of those estates, at the *Glamor-*

(*a*) See, as to a part of the proceedings, *Doe dem. Rees* v. *Thomas*, 2 *B.* & *C.* 622. It appeared by affidavit in the present case, that, after the decision reported in 2 *B.* & *C.* 623., the rule made absolute on the Master's report, as there stated, was discharged, and the matters referred back.

ganshire

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ganshire great sessions in Spring 1821, and had a verdict. That *William Rees* the father, and *Terry*, brought ejectment for another portion (as before stated) and obtained a verdict against *Thomas*, at the Autumn great sessions, 1821. That *William Rees* the father was not, as the deponent believed, informed of the terms upon which the rule for a new trial in the latter ejectment was made absolute: that, before the arrangement for that purpose took place, the attorney, who had acted for *William Rees* the father and *Terry* until after the first trial of the last-mentioned ejectment, refused to proceed further, on account of their inability to furnish funds; and another attorney, having persuaded them to reject an offer of compromise made at that time on behalf of *Thomas* and *Bevan*, undertook the business. That *William Rees* the father did not know of, or consent to, the use of his name as party to any other action of ejectment against *Thomas* and *Bevan*, nor was he party to any legal proceeding from the time when the verdict was found for *Thomas* and *Bevan*, till his death. That *William Rees* the father never attended, or knew of any person attending for him, any taxation of costs claimed by *Thomas* and *Bevan*, nor (as the deponent believed) were such costs ever demanded of him, or of the lessor of the plaintiff after his decease; nor (as the deponent believed) did *Thomas* and *Bevan* ever pay costs to *William Rees* the father, or *Terry*, or any person on behalf of either, in the ejectments in which the latter succeeded. The deponent then stated (on his information and belief) an indenture of *March* 22d, 1827, between *Terry* of the first part, *David Williams* of the second part, and *Thomas* and *Bevan* of the third part, whereby, for certain pecuniary considerations, and

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in consideration of a covenant by *Thomas* and *Bevan*, suspending their claim to costs in the action tried in 1823, *Terry* remised, released, &c., to *Thomas* and *Bevan*, to certain uses, all and singular the hereditaments, &c., late of *William Rees* of *Court Colman*. Another deed was in like manner stated, of even date with the preceding, by which (reciting, among other things, an agreement by *Terry* in consideration of *Thomas* and *Bevan* agreeing to give up their alleged claim to costs), the compromise with *Terry* was further carried into effect, by securing an annuity to him upon certain premises. The compromise appeared to have been made in pursuance of an agreement entered into by *Terry* with *Thomas* and *Bevan* in 1825.

Sir *F. Pollock* now shewed cause. The rule requiring that the costs of a former ejectment shall be paid before a new one is proceeded in upon the same title, often tends to hardship, and ought not to be extended. The father of the lessor of the Plaintiff had obtained two verdicts in favour of the title in question, and appears to have been ultimately deterred from prosecuting his claim by poverty. The son, suing upon the same title, is now called upon to pay the costs of the third ejectment in which the defendants succeeded. There is no instance in which the rule has been enforced under such circumstances. *Doe dem. Church v. Barclay* (*a*) shews the disinclination of the Court to extend the rule. [*Coleridge* J. mentioned *Doe dem. Feldon* v. *Roe* (*b*)]. That case does not apply where two former causes have been gained by the ancestor of the lessor of the Plaintiff, and an offer

(*a*) 15 *East*, 233. (*b*) 8 *T. R.* 645.

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of compromise has been made. If, as is sometimes said, the object of the Court, in granting the interference now required, has been to prevent vexation, that reason does not exist here. [*Patteson* J. Are not the defendants without remedy for the costs recovered against the father, if they cannot obtain them in this way? They cannot proceed against the executors as in other actions. Lord *Denman* C. J. It is a ground for interposing in this manner in ejectment, that a verdict against the ancestor does not bind the heir. *Williams* J. A reason for such interposition, adopted by Lord *Kenyon* in *Doe. dem. Feldon* v. *Roe* (*a*), is, "that ejectments were introduced in lieu of real actions, in which all the representatives of the party to the first suit would have been concluded for ever;" and that therefore the fictitious remedy so introduced should not be allowed to press unnecessarily hard]. The lessor of the plaintiff will give an undertaking to pay the former costs if he should succeed. It does not appear that the costs were ever demanded of the father, or that, if they had been, he might not have been able to pay them. Besides, the defendants have taken from *Terry* a release of his claims, which is probably an equivalent to payment of the costs; and they have covenanted to forbear urging their claim against him for costs. After this, they cannot make the costs a bar to an ejectment by the lessor of the plaintiff.

Maule contrà. The interposition claimed is a matter of every day practice; and the affidavits in this very case shew precedents of it. It is true that the stay of pro-

(*a*) 8 *T. R.* 645.

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ceedings here was granted against the father; but the case of the son is not distinguishable, he suing on the same title. The rule is laid down generally in 2 *Tidd's Practice* (*a*), where it is said that formerly the courts would not have stayed proceedings till payment of costs in a former ejectment, unless there appeared vexation in the conduct pursued; but, it is added, "the practice in that respect is altered; and it is now settled that the proceedings may be stayed in all cases, until the costs are paid of a former ejectment." The action of ejectment is always considered as subject, by its nature, to such rules as the Court may think proper to lay down for the government of the parties: and one of those rules is, that, inasmuch as the defendant has not the same advantages with respect to costs as defendants in other actions, and as a verdict for him is no bar to a new ejectment on the same title, such new ejectment shall not be brought without paying the costs of the previous one. It would be dangerous to relax the rule upon affidavits which cannot be answered. Such a practice would oblige parties making an application like the present to enter into a detail of merits, which the Court would have to try on affidavit. It is said that this application ought not to be granted, because the costs have never hitherto been demanded; but there is no rule to that effect. The parties may have forborne their demand for the sake of quietness; a reason which would no longer exist when their possession was again threatened. The alleged agreement with *Terry* rests only on hearsay, and, at most, its effect appears to be, that the defendants' claim to

(*a*) Page 1232, 1233. 9th ed.

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costs will not be enforced, while he leaves them in undisturbed possession. Nor would it be urged against the lessor of the plaintiff, but for the purpose of quieting the possession.

Lord Denman C. J. Upon the whole, after a full explanation of all these matters, we do not think that the case is taken out of the ordinary rule.

Patteson and Williams Js. concurred (*a*).

Rule absolute.

(*a*) *Coleridge* J. had left the Court during the argument.

Tuesday, Nov. 24th.

The King *against* John Sillifant, Esquire.

On application for a mandamus to a justice to enforce payment of a church rate under stat. 53 *G.* 3. *c.* 127. *s.* 7., it appeared that the party assessed had objected to the rate as invalid, in the Consistorial Court, but that the rate had there been confirmed; and that the party, being afterwards summoned before a petty session, repeated his former objection: Held that, the validity of the rate having been questioned in the Ecclesiastical Court, although it did not appear that such question was any longer depending, the jurisdiction of the justices under *s.* 7. of the act was so far doubtful that a mandamus could not issue.

The rate was regular on the face of it; but appeared (by affidavit) to have been voted by the parishioners in vestry for the purpose of meeting past disbursements. *Semble*, that the rate was not therefore bad, whatever objection might be raised to a retrospective application of the money on passing the churchwarden's accounts.

IN the last term a rule nisi was obtained for a mandamus, calling upon Mr. *Sillifant*, a magistrate of the county of *Devon*, to make an order upon *George Nickels*, a parishioner of the parish of *Stoke-in-teignhead* in the same county, for the payment of a church-rate assessed upon him in respect of lands in that parish. The rate was made, *April* 3d 1835, pursuant to a resolution of the parishioners in vestry, and purported to be "for and towards the repairs of the church of the said parish, and for such other purposes as a church-rate is by law applicable to, for the present year." *Nickels* was

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therein rated for 4*l.* 10*s.* The affidavit, (sworn by the sole churchwarden), in support of the rule, stated that, on the rate coming before the Consistorial Court of the Bishop of *Exeter* for confirmation, *Nickels* personally appeared in the court, and objected to the rate, that the glebe was not rated, which objection the Judge overruled, and the rate was adjudged by the said court to be confirmed, and was confirmed by an instrument under the seal of the court. Payment was afterwards demanded of *Nickels*, and refused; whereupon the churchwarden, under stat. 53 *G.* 3. *c.* 127. *s.* 7., summoned *Nickels* to appear, and he did accordingly appear, before two justices of the county, one of whom was Mr. *Sillifant*. The churchwarden made oath, before the justices, of the rate having been demanded, upon which *Nickels* objected that it was not a fair rate; and Mr. *Sillifant* then said that the rate was not lawful, because the money was expended first, and at the end of the year the rate had been made; instead of which the churchwarden ought to have had an estimate and called a vestry at the beginning of the year, and then made a rate. The affidavit proceeded: — "And thereupon this deponent's complaint was dismissed, and no order made by the said justices. And this deponent saith that the said *John Sillifant* refused to make any order for the payment of the said rate by the said *George Nickels* for the reasons and in manner aforesaid." The validity of the rate, and *Nickels*'s liability, were not otherwise disputed before the justices. The affidavit further stated that, in *March* 1834, 130*l.* was borrowed on the credit of the church rates, pursuant to stat. 59 *G.* 3. *c.* 134. *s.* 14., for new seating the parish church, with the consent of the rector and ordinary, to

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be repaid by annual instalments, with 5*l.* per cent. interest. That on the 29th of *March*, 1835, 6*l.* 10*s.* became due for interest, and 13*l.* for the first instalment. That the resolution of the parishioners in vestry for making the rate was passed upon an account, laid before the vestry by the churchwarden, of disbursements by him in that capacity, between *Lady-day* 1834 and *Lady-day* 1835, including the above sum of 19*l.* 10*s.*; and that the said rate was applied for and granted for the raising of money to be placed in the churchwarden's hands to pay the said interest and instalment, and to meet his other disbursements as churchwarden during the year ending at *Lady-day* 1835.

Mr. *Sillifant* made an affidavit in opposition to the rule, by which it appeared that, on the summons, *Nickels* objected to the rate as illegal, inasmuch as certain lands had not been included. That the fact of the rate having been made in part for by-gone expences had not been stated in the ecclesiastical court. And that the two justices concurred in dismissing the churchwarden's complaint, believing that the rate had been illegally made, and that they had no jurisdiction to enforce payment.

Crowder now shewed cause. It is true that the objection upon which the magistrates dismissed the complaint was not stated by *Nickels* himself, but that is not material. Under stat. 53 *G.* 3. *c.* 127. *s.* 7. (*a*), if the party

(*a*) Stat. 53 *G.* 3. *c.* 127. *s.* 7. "And whereas it is expedient that church rates or chapel rates of limited amount, unduly refused or withheld, should in certain cases be more easily and speedily recovered; be it enacted, that, from and after the passing of this act, if any one duly rated to a church rate or chapel rate, the validity whereof has not been questioned

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party summoned makes it appear to the justices that the validity of the rate is bonâ fide disputed, they cannot proceed to judgment, but must leave the party demanding such rate to the remedy which he might formerly have had; *Rex* v. *The Chapelwardens of Milnrow* (*a*), *Rex* v. *Wrottesley* (*b*). In the latter case it was held that the justices ought to hear the parties, for the purpose of ascertaining that the rate is bonâ fide disputed; but here that has been done. The justices have

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questioned in any ecclesiastical court, shall refuse or neglect to pay the same sum at which he is so rated, it shall and may be lawful for any one justice of the peace of the same county, riding, city, liberty or town corporate, where the church or chapel is situated, in respect whereof such rate shall have been made, upon the complaint of any churchwarden or churchwardens, chapelwarden or chapelwardens, who ought to receive and collect the same, by warrant under the hand and seal of such justice, to convene before any two or more such justices of the peace any person so refusing or neglecting to pay such rate, and to examine upon oath (which oath the said justices are hereby empowered to administer) into the merits of the said complaint, and by order under their hands and seals to direct the payment of what is due and payable in respect to such rate, so as the sum ordered and directed to be paid as aforesaid do not exceed 10*l.*, over and above the reasonable costs and charges, to be ascertained by such justices; and upon refusal or neglect of such party to pay according to such order, it shall and may be lawful for any one of such justices, by warrant under his hand and seal, to levy," &c. (clause of distress; with appeal, by any person finding himself aggrieved, to the general quarter sessions). "Provided also, that nothing herein contained shall extend to alter or interfere with the jurisdiction of the ecclesiastical courts to hear and determine causes touching the validity of any church rate or chapel rate, or from proceeding to enforce the payment of any such rate, if the same shall exceed the sum of 10*l.* from the party proceeded against: Provided likewise, that if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon, and the person or persons demanding the same may then proceed to the recovery of their demand, according to due course of law, as heretofore used and accustomed."

(*a*) 5 *M.* & *S.* 248. (*b*) 1 *B.* & *Ad.* 648.

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fully exercised their discretion. And further, by the earlier part of the section, if the validity of the rate has actually been questioned in any ecclesiastical court, the justices have no jurisdiction at all. Here the rate had been contested in the ecclesiastical court. As to the principal question, supposing the case to be within the jurisdiction of the justices, they could not enforce the rate, because, being made to meet the disbursements of a previous year, it is invalid; *Tawney's Case* (*a*), *Rex* v. *The Chapelwardens of Haworth* (*b*), *Dawson* v. *Wilkinson* (*c*), *Lanchester* v. *Thompson* (*d*). If the Court even consider the case doubtful, a mandamus should not be granted. And at all events this rule cannot be made absolute, because it calls for a mandamus to one justice only, whereas two were applied to, and refused the order.

Sir *W. W. Follett*, contrà. It is true that, if the party summoned gives notice to the justices that he bonâ fide means to dispute the rate, they are justified in refusing to go into the question. But, here, the objection advanced by *Nickels*, that the glebe land was not rated, had been decided upon by the ecclesiastical court. There was, therefore, no dispute pending or about to be raised on any objection taken by *Nickels*. But then the justices say, it appears that the rate was retrospective. Now the rate, on the face of it, was regular, and, that being so, justices had no right to inquire into its validity. The act was not intended to vest that power in them. The validity of the rate is to be discussed in the ecclesiastical court.

(*a*) 2 *Ld. Ray.* 1009.
(*b*) 12 *East*, 556.
(*c*) *Ca. K. B. temp. Hardwicke* (by *Lee*), 381.
(*d*) 5 *Mad.* 4.

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court. As to the objection itself, that the purposes of the rate were retrospective; as far as the loan and interest are in question, the churchwarden was not only authorised, but required, to include those among the objects for which the rate was laid, by stat 59 *G.* 3. *c.* 134. *s.* 14.; and, with respect to the disbursements, it is not clear that the parishioners may not, if they think proper, vote for a rate to repay past disbursements: at all events the contrary was not decided in *Dawson* v. *Wilkinson* (*a*) and *Lanchester* v. *Thompson* (*b*), where the attempt was to compel the making of such a rate. The rate does not purport to be made to meet any but the current expenses of the year. Admitting that it was voted upon an account, laid before the vestry, of former disbursements, that does not authorise the magistrates to interfere with a rate which, on the face of it, is regular. If the rate, when raised, were applied retrospectively, that might be made an objection to the accounts. It is contended that the justices cannot interfere because this is not a rate "the validity whereof has not been questioned in any ecclesiastical court." But where the rate, after being disputed, has been confirmed in the ecclesiastical court, that seems to be the very case in which the justices ought to act in order that the rate may be recovered. [*Coleridge* J. If the liability of a party to pay were litigated in the ecclesiastical court, that court, if it decided against him, might compel him to pay. The rate would be recoverable in the same suit in which it was litigated. Does not the act mean that, where the validity of the rate itself has become a matter

(*a*) *Ca. K. B. temp. Hardwicke* (by *Lee*), 381. (*b*) *5 Mad.* 4.

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of question in the ecclesiastical court, the magistrates shall not interfere at all for the purpose of enforcing it against individuals?] The power of the ecclesiastical courts to enforce it seems to be tacitly withdrawn in cases where the amount of rate is below 10*l.* Then can it be contended that the justices also are without power in such cases? [*Coleridge* J. The argument on the other side appears to be that the power of the ecclesiastical courts is not taken away in cases where the amount is under 10*l.*, if the validity of the rate has been questioned.] The clause must be taken to contemplate some proceeding actually dependent. As to the last point, the application could not be made against both justices, because, according to the affidavit in support of the rule, only one justice refused to make the order.

Lord DENMAN C. J. It is not easy to construe the enactments of 53 *G.* 3. *c.* 127. on this subject. But there is a circumstance upon which the jurisdiction of justices in a case of this kind is said to be founded, and which does not exist here, namely, that the validity of the rate shall not have been questioned in any ecclesiastical court. Here, not only has the validity of the rate been questioned in an ecclesiastical court, but the same objection which was there raised was afterwards taken before the justices, and they were required, upon that ground, to treat the rate as illegal. It is therefore very doubtful, at least, whether they had jurisdiction to enforce the rate, and that is sufficient ground for refusing a mandamus. It is also a well founded objection to this rule, that it is applied for against one justice only, whereas it does not appear that one only refused the order.

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PATTESON J. I certainly thought at first that the words "the validity whereof has not been questioned in any ecclesiastical court" referred to a question actually in a course of discussion. But it is very difficult to say that, in such a case as the present, there does not appear a want of jurisdiction in the justices. The affidavits do not distinctly shew that the question in the ecclesiastical court, is determined; and, even if they had shewn this, I do not say that the jurisdiction would have been established.

COLERIDGE J. (*a*). If the jurisdiction is matter of doubt, that is a sufficient answer. We are not to expose the magistrates to an action of trespass.

Lord DENMAN C. J. I believe we are all satisfied that there is nothing in the objection that the purposes of this rate are retrospective, the rate being correct on the face of it. That point could be raised only in objecting to the accounts.

Rule discharged (*b*).

(*a*) *Williams* J. had left the Court.

(*b*) As to the construction of stat. 53 G. 3. c. 127. s. 7., see *Ricketts* v. *Bodenham*, p. 433. post.

Wednesday, Nov. 25th.

TARBER *against* FRENCH.

A defendant, who is arrested on the 10th of *June* on a ca. sa., which does not comply with the rule of Court, *Hil.* 2 & 3 *G.* 4. (requiring the place of defendant's abode, &c. to be indorsed), is too late in applying to the Court in *Michaelmas* term following, to be discharged on the ground of irregularity; although he swears that he was not aware of the irregularity until the time when he made the application.

THE defendant was arrested, on the 10th of *June* last, on a ca. sa. at the suit of the plaintiff, and on the 18th of the same month he removed himself from the custody of the sheriff into that of the marshal. *Knowles*, in the present term, obtained a rule to shew cause why the defendant should not be discharged out of custody, on the ground that the writ was irregular, the defendant's address not being indorsed, in conformity with the rule of Court, *Hil.* 2 & 3 *G.* 4. (*a*). It appeared by the affidavits that this application had been made to *Littledale* J. at chambers on the 17th of this month, when the defendant swore that he was not aware of the irregularity until a day or two before the application at chambers. The learned Judge refused to interfere, and referred the defendant to the Court.

Petersdorff now shewed cause, and contended that the defendant was too late in his application (*b*).

Knowles, contrà. The rule, as to applying in reasonable time to set aside proceedings for irregularity, is construed with reference to the time at which the party applying first has knowledge of the irregularity; *Blackburn* v. *Peat* (*c*). Besides, the Court will not allow laches to prejudice liberty; this was laid down in a simi-

(*a*) 5 *B.* & *Ald.* 560.: repealed, as to meane process, by stat. 2 *W.* 4. c. 39., *Bodfield* v. *Padmore*, 5 *B.* & *Ad.* 1095.

(*b*) See *Constable* v. *Fothergill*, 2 *Dowl. P. C.* 591.

(*c*) 2 *Dowl. P. C.* 293.

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lar case in *Trinity* term, 1834 (*a*). [Lord *Denman* C. J. It is clear that, where the process is void, laches does not prejudice; but that is all which the rule determines (*b*)]. No fresh step has been taken since the execution of the writ. [*Patteson* J. None could be taken after the execution of final process.]

Per Curiam (*c*),

Rule discharged (*d*).

(*a*) See note (*d*), below.

(*b*) See *Smith* v. *Sandys*, 3 *A.* & *E.* 693.

(*c*) Lord *Denman* C. J., *Patteson*, and *Coleridge* Js.

(*d*) The following is the case alluded to in the argument:

MORTIMER *against* MARY SUSANNAH PIGGOT.

Thursday, June 12th 1834.

If a defendant be taken in execution upon a ca. sa. sued out more than a year and a day after the judgment, without a scire facias, he may be discharged at any distance of time, and does not waive the objection, however long he may remain in custody.

THE plaintiff recovered judgment against the defendant, as of *Trinity* term 1819; and, in 1821, he took the defendant on a ca. sa., issued more than a year and a day after the judgment, without a scire facias. The defendant remained in the custody of the sheriff, under the execution, until removed by habeas corpus to the custody of the marshal. *Humfrey* obtained a rule in *Easter* term 1834, calling on the plaintiff to shew cause why the defendant should not be discharged out of custody.

Sir *James Scarlett* now shewed cause, and contended that the defendant was too late in her application, and must be considered as having waived the objection.

Humfrey, contrà, contended that, in the case of a prisoner in execution, such an objection was never waived.

Lord DENMAN C. J. It seems to be an established rule, that a party in custody in execution is never barred from taking the objection. The primâ facie case is, therefore, not answered.

LITTLEDALE, TAUNTON, and WILLIAMS Js. concurred.

Rule absolute.

See 2 *Chitty's Archbold*, p. 715. note (*x*), and p. 920. note (*x*), 3d ed., 1836, where this case is cited from 2 *Dowl. P. C.* 615., and the decision questioned inasmuch as the Court is there reported to have held that the proceeding was a nullity. See, as to that point, the authorities cited in 2 *Chitt. Arch.* 715. note (*x*); also the judgment in *Hiscocks* v. *Kemp*, 3 *A.* & *E.* pp. 679, 680.

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PAYNE and Another *against* CHAPMAN.

A certificated bankrupt, being arrested on a ca. sa. for a debt proveable under the commission, paid the money under a protest, stating his bankruptcy and certificate, and warning the sheriff that he should apply to the Court to have the money paid back:

Held, that this was not such a payment of money under legal process, with knowledge of the facts, as precluded the bankrupt from recovering back the money.

THE defendant, a certificated bankrupt, was arrested on a ca. sa. at the suit of the plaintiffs, for a debt of 18*l.* proveable under the commission. To obtain his liberty, he paid the debt and costs into the hands of the officer, but delivered to him at the same time a written notice to the sheriff, stating that he was not liable to the arrest, by reason of the bankruptcy and certificate; that he protested against such arrest; that he had claimed his discharge, which being refused, he, with that notice, deposited the sum claimed for debt, costs, &c., protesting against the right to demand them; and that he warned the sheriff not to pay over any of the money, it being his intention to dispute the claim to it, and to apply to the Court or a Judge that it might be returned. The sheriff kept the money in his hands. A rule was obtained in this term, calling on the sheriff and the plaintiffs to shew cause why the 18*l.* should not be paid over to the defendant. By the affidavits in answer, it appeared that the writ had been issued before the certificate was allowed: that the defendant kept himself secreted until he had obtained the certificate; and that, three days afterwards, he put himself in the way of the officer, for the purpose, as was alleged, of being arrested, and of subjecting the plaintiffs to costs. Upon the arrest he produced his certificate, and claimed to be discharged.

Crowder, for the plaintiffs, and *J. Henderson* for the sheriff, now shewed cause, and contended that the defendant

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fendant ought to have applied for his discharge under stat. 6 G. 4. c. 16. s. 126.; and that, not having done so, and having paid the money under legal process, with full knowledge of the facts, he could not now recover it back, as to which point they relied on *Hamlet* v. *Richardson* (a).

Per Curiam (b), (Stopping Sir *W. W. Follett*). This is not the case of a party, with knowledge of the facts, paying money under legal process, as in *Hamlet* v. *Richardson* (a), for the defendant here paid it under a protest, by which he said, in effect, that, if the sheriff was not entitled to take it, it must be paid back.

Rule absolute.

(a) 9 *Bing.* 644.

(b) Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

LEVY *against* Sir THOMAS S. M. CHAMPNEYS, Bart. and Another.

Wednesday, Nov. 25th.

THE sheriff of *Somerset* having taken the defendant's goods in execution at the suit of the plaintiff, and the goods being claimed by *Wright* and Co. under a bill of sale from the defendant, it was ordered, by a rule of this Court, *January* 28th 1834, after hearing the several

A sheriff having taken goods in execution, which were claimed by a third party, obtained an interpleader rule. The parties appeared; and a rule was made that the parties should appear in the next term and maintain or relinquish their claims, &c., and that, in the meantime, the sheriff should continue in possession till further order of the Court, and proceedings against him be stayed; and that a feigned issue should be tried between the claimants at the next assizes. The issue was tried, and the third party obtained a verdict against the execution creditor. The latter obtained a rule for a new trial, which rule, after the lapse of five terms, was discharged. The sheriff had, by direction of the execution creditor, quitted possession before the rule for a new trial was discharged. The interpleader rule had never been enlarged, or in any manner formally continued:

Held that the Court might, nevertheless, act upon the interpleader rule for the purpose of awarding to the successful party his costs of appearing to the sheriff's rules, and costs of keeping possession, if properly incurred by such party.

parties,

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parties, that the second day of the then next term should be further peremptorily given to the parties respectively to appear, &c., and maintain their respective claims, &c., or else relinquish the same, and to shew cause why the Court should not make such rule or rules respecting the same as to it should seem fit, pursuant to the statute (1 & 2 *W.* 4. *c.* 58. *s.* 6.); that in the mean time the sheriff should continue in possession till further order of the Court, and proceedings against him by the plaintiff be stayed; and that a feigned issue should be tried, wherein *Wright* and Co. should be plaintiffs, and the plaintiff *Levy* defendant, the parties undertaking to go to trial at the next assizes. It was subsequently ordered that the judge might indorse any special matter on the postea. The feigned issue was tried at the next assizes, and a verdict found for the plaintiffs, *Wright* and Co.; and it was indorsed on the postea, that the jury found all the goods to have been the property of the plaintiffs when seized by the sheriff. Early in the ensuing (*Easter*) term, a rule nisi was obtained for a new trial. In the same term the sheriff obtained a rule calling on the parties to the issue to shew cause why he should not be allowed his costs of keeping possession, to be ascertained by the Master; which rule was, by a rule of *Trinity* term, 1834, discharged by consent, the plaintiffs and defendant on the issue undertaking that the unsuccessful party should pay such costs from the fourth day of the preceding term.

The rule for a new trial was discharged in *Trinity* term 1835. The plaintiffs, *Wright* and Co., taxed their costs, and claimed to include those incurred by them in appearing to the sheriff's rules, and also costs of keeping

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ing possession of the goods pending the issue. The plaintiffs themselves had kept such possession during a part of the time, the sheriff having withdrawn, in consequence, as the plaintiffs represented, of an arrangement between them and *Levy*. The Master not thinking himself authorised to allow the latter costs without an order for that purpose, and a question being also raised whether the plaintiffs on the issue were entitled to their costs of appearing to the sheriff's rules, an application was made to a Judge at chambers, who declined to interfere, considering it necessary, under the Interpleader Act, that such order should be made by the Court.

In the present term, a rule was obtained at the instance of *Wright* and Co., calling on the plaintiff in the suit *Levy* v. *Champneys* to shew cause why the rule of *January* 28th, 1834, should not be revived, and why *Wright* and Co., or the plaintiffs in the issue directed by the said rule, should not be allowed their costs of such issue, and of appearance on the sheriff's rules, and also their costs of possession pending the said issue, and of this application.

Humfrey now shewed cause. The Court has no power to act under stat. 1 & 2 *W.* 4. *c.* 58. *s.* 6., except on application made by the sheriff; and here the affidavits shew that the sheriff's rule of *January* 28th has been suffered to drop. There is nothing to indicate that it was alive after *Easter* term, 1834. [Lord *Denman* C. J. The usual course is to enlarge the rule from time to time, till every thing required by the act has been done.]

Sir

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Sir *W. W. Follett*, contrà. The rule has not dropped; and, if it had, the Court may revive it for the purpose of giving these costs; *Seaward* v. *Williams* (*a*).

Lord DENMAN C. J. The Court is not to be bound by these metaphors of a rule expiring and being revived. It must be understood that the rule is in existence for the purpose of an application like this, without being formally continued from term to term.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

The order made was, that the rule of *January* 28th, 1834, "should be revived;" and that the plaintiffs in the issue should be allowed their costs of such issue, and of appearance on the sheriff's rules: and it was referred to the Master to tax the costs, and to ascertain whether the plaintiffs in the issue were entitled to any, and what, costs of keeping possession; the costs of this application to be also in the Master's discretion.

(*a*) 1 *Dowl. P. C.* 528.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

AND

UPON WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

Hilary Term,

In the Sixth Year of the Reign of WILLIAM IV.

1836.

The Judges who usually sat in Banc this term were,

Lord DENMAN C. J. — WILLIAMS J.
LITTLEDALE J. — COLERIDGE J.

TICKLE *against* BROWN.

TRESPASS. The first count was for assaulting and beating the plaintiff's servant; the second count was for assaulting, beating, and imprisoning the servant;

The words "enjoyed by any person *claiming right*," applied to easements, in stat. 2 & 3 *W.* 4. c. 71. *s.* 2., and "enjoyment thereof *as of right*." in *s.* 5., mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or on many; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall be strictly legal, as by prescription and adverse user, or by deed, or shall have been merely lawful so far as to excuse a trespass.

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To a plea of forty or twenty years' enjoyment of a way, a licence, if it cover the whole time, must be pleaded.

But a parol or other licence, given and acted on *during* the forty or twenty years, may be proved under a general traverse of the enjoyment *as of right*: and this, whether such licence be granted for a single time of using, or for a definite period.

Semble, that, where issue is joined on the allegation of an interruption acquiesced in, the party alleging the interruption, having proved a non user during part of the time, may, in order to shew that such non-user was not a voluntary forbearance, give evidence that, two years before the non user commenced, the party claiming the way paid a consideration for being allowed to use it.

vant; the third count was for beating, illtreating, keeping, and detaining the plaintiff's horse; the fourth count was for taking and carrying away goods and chattels of the plaintiff, and converting and disposing thereof to the defendant's use.

First plea, Not guilty.

Second plea, to the first, second, and third counts, and as to taking and carrying away certain of the goods and chattels, that defendant was possessed of a close, and that the plaintiff and his servant attempted to pass over it with the horse, which was then carrying the goods and chattels, and had driven and ridden him over a part, against the will of the defendant; and the defendant justified the trespasses in defence of the possession of the close. Replication, that long before, and at the times when &c. the plaintiff was, and from thence hitherto has been, and still is, occupier of certain land near the said close; and that the plaintiff, while he was such occupier, and the other occupiers, have respectively, for and during the whole period of forty years next before the commencement of this suit (*a*), used and actually enjoyed, as of right and without interruption, a certain way, unto, into, through, and over the defendant's close (which way was described in the replication); and the said plaintiff having occasion &c. (justifying the act of the plaintiff and his servant, mentioned in the second plea, in virtue of the right of way); and thereupon the defendant of his own wrong &c. Rejoinder, that the plaintiff and divers of the others occupiers of the lands, whilst they were occupiers, and during the said period of forty years, to wit, on the 1st of *January* 1797, and on divers

(*a*) As to this allegation, see *Wright* v. *Williams*, 1 *Mee. & Wel.* 77. *S. C.* 1 *Tyr. & Gr.* 375.

other

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other days and times between that day and the commencement of this suit, were interrupted in the use and enjoyment as of right of the way in the replication mentioned, and the parties so interrupted submitted to and acquiesced in the interruptions for the space of one year and more after they had notice thereof, and of the persons making the same, and while the parties so interrupted were occupiers, &c. Verification. The surrejoinder traversed the interruption and acquiescence in manner and form &c. Similiter.

Third plea, to the third count, that the plaintiff and his servant were attempting to drive and ride the horse over a part of the defendant's close, &c.; and the plea justified the trespass in defence of the possession of the close. Replication, as the replication to the second plea, mutatis mutandis. Rejoinder, that the plaintiff and his servant were attempting to drive and ride the horse over a certain part of the close in a north-easterly line and direction from &c. (describing the direction), which are the same trespasses committed by the plaintiff and his servant, mentioned in the second plea; and, further, that the plaintiff and the other occupiers of the said lands have not respectively, for and during the full period of forty years next before the commencement of this suit, used and actually enjoyed, as of right, any such way &c. in the line and direction hereinbefore mentioned. Verification. Surrejoinder, that the plaintiff and other occupiers have, for and during the full period &c., used, &c., the said way, &c., over the said close in the line and direction mentioned in the rejoinder. Similiter.

On the trial before Lord *Denman* C. J., at the *Devonshire* Summer assizes, 1834, the trespasses were proved, and prima facie evidence of the enjoyment of the way for

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forty years was also given. The defendant proved that, about the year 1800, the close was ploughed up for tillage, and that, while it was under tillage, which was for three or four years, the way had not been used; and the plaintiff's counsel having suggested that this was merely an abstinence, by the parties entitled to use it, for the convenience of the owner of the close, the defendant proposed to ask a witness whether 1*d.* a year had not been paid, in 1798, by the occupiers of the land in right of which the way was claimed, for the use of the way. The plaintiff's counsel objected that this evidence could not be given, under stat. 2 & 3 *W.* 4. *c.* 71. *s.* 5. (*a*). The Lord Chief Justice rejected the evidence.

(*a*) Stat. 2 & 3 *W.* 4. *c.* 71. *s.* 2. enacts, "That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the duchy of *Lancaster* or of the duchy of *Cornwall*, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

Sect. 5. enacts, "That in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act

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evidence. Evidence was also offered of declarations made by occupiers of the same land, antecedently to the close being under tillage, that they were not entitled to use the way except by permission of the owners of the close. This was objected to, and excluded. Verdict for the plaintiff on all the issues. In *Michaelmas* term, 1834, *Coleridge* Serjt. obtained a rule to shew cause why a new trial should not be had, on the ground of the rejection of evidence of the payment, and also of the rejection of evidence as to the declarations, so far only as the admissibility of such evidence could be shewn by virtue of the statute: but the rule was refused, so far as it was applied for on the ground that the declarations of the occupiers, unaccompanied by any act, were evidence independently of the statute.

In *Michaelmas* term last, on the 18th and 19th of *November* (*a*),

Sir *W. W. Follett* and *Crowder* shewed cause. The evidence rejected was not admissible on either of the last two issues. The first of these two issues is, whether

act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

(*a*) Before Lord *Denman* C. J., *Patteson*, and *Williams* Js. *Coleridge* J., having been counsel in the cause, took no part.

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there was an interruption, acquiesced in by the occupiers. That issue was upon the defendant, who did give some evidence of an interruption acquiesced in, by shewing that the way over the close was not used while it was under tillage. That evidence was not objected to; but the jury, by their verdict, have shewn that they considered it insufficient. Then, how could the payment of money, or the declaration of a tenant, affect the question of fact, whether the way was uninterruptedly used? It is said that the payment and declarations are evidence to explain the nature of the abstinence from using the way by the parties claiming right to it. But the abstinence was long after the payment and the declarations; so that the connection between these facts, as to which evidence was rejected, and the interruption, entirely fails. If the payment had been made after, or during, the time for which the way was not used, it might have been argued that such payment was proof of acquiescence.

On the last issue, the plaintiff was to prove that the occupiers of the land had enjoyed the way, in the direction mentioned in the rejoinder, for forty years: the interruption was not asserted. Then it is attempted to shew that this enjoyment was by virtue of an agreement. But the fifth section of the statute expressly provides that a party relying upon the enjoyment having taken place under any contract not inconsistent with the simple fact of enjoyment (which contract, by the second section, would be an answer to the proof of forty years' uninterrupted enjoyment, if it were by deed or in writing), must set it forth specially, and that it shall not be received in evidence on a general traverse of the allegation of enjoyment. The agreement here set up is consistent

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consistent with the simple fact of enjoyment. If this evidence were held admissible, the statute would be repealed in two ways; first, by allowing an agreement not under seal, or written, to meet the proof of enjoyment; secondly, by allowing it to be given in evidence on the general traverse. In *The Monmouthshire Canal Company* v. *Harford* (*a*) issue was joined on a plea that an easement had been enjoyed twenty years of right and without interruption; and the Court appears, from what passed in the argument (for no express judgment was given on the point), to have held that, on this general traverse, the plaintiff was entitled to shew that leave was asked. That, however, is very different from the evidence offered here. By asking leave, the party admits his want of right; but a payment shews only that the enjoyment was under a contract. In the case referred to, the Court seems to have relied on *Bright* v. *Walker* (*b*). But it does not appear that the point arose in this latter case. [*Patteson* J. In the other case, the plea was of a twenty years' enjoyment, to which a parol licence might have been replied, though not to an allegation of forty years' enjoyment.] In those cases, there would have been the same objection to proving an agreement, whether by word of mouth, or by deed, or writing, if not pleaded specially, as here: besides which, there is here the additional objection that a verbal agreement is no answer, even if pleaded. The Court, in *Bright* v. *Walker* (*c*), seem by the expression, "if he shall have *occasionally* asked the permission of the occupier of the

(*a*) 1 *Cr. M. & R.* 614. *S. C.* 5 *Tyrwh.* 68.
(*b*) 1 *Cr. M. & R.* 211. *S. C.* 4 *Tyrwh.* 502.
(*c*) 1 *Cr. M. & R.* 219. 4 *Tyrwh.* 509.

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land," to point to some distinction between a contract for the permanent use, and a contract for the time only. At all events, the judgment shews only that cases may occur in which the fact of a permission may prevent the party permitted from claiming the easement as of right. The objection to the proof of a verbal agreement here is, in effect, the same as the objection to the proof of a written agreement would be; namely, that it is an attempt to negative on a general traverse the fact of enjoyment as of right, by shewing that the enjoyment has taken place, not as of right, that is not by a right permanent, or adverse to that of the owner of the close, but by virtue of a contract consistent with the fact of simple enjoyment. [*Patteson* J. The words "as of right" cannot mean an adverse right; for the statute provides that, if the enjoyment be under an agreement, the agreement must be pleaded specially; by which plea the allegation of enjoyment "as of right" would be met, not by way of denial, but by way of confession and avoidance.] It would be a right under the agreement, a purchased right in the present case: though a continual necessity of obtaining leave, at each time of user, might shew the absence of a right. The mere traverse of the enjoyment does not put in issue the way in which the enjoyment is obtained, any more than, in trover, a traverse of the conversion, by a plea of Not Guilty, puts in issue the rightfulnesss or wrongfulness of the conversion (*a*). [Lord *Denman* C. J. That is a very different case. Here the plaintiff undertakes to prove that he has enjoyed as of right.]

(*a*) See *Frankum* v. *The Earl of Falmouth*, 2 *A.* & *E.* 452.

Sir

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Sir *John Campbell*, Attorney-General, and *W. C. Rowe* contrà. The evidence was admissible under both issues. First, as to the issue on the interruption alleged to have been acquiesced in. It is true, as urged on the other side, that the jury, on the evidence admitted, have negatived the interruption: but the complaint is that they had not before them the whole of the evidence properly applicable to the question. The payment of the penny was so applicable; for it shewed an interruption in fact, since the owner of the close must be understood to have refused the passage until the payment was promised: it shewed also an acquiescence by the party paying: and it shewed the true character of the non-user which afterwards took place. And the declarations were also admissible on this issue. Independently of the statute, if the party had declared, at the time of paying, that he did so by leave, that would have been evidence, as a declaration accompanying an act. Here, the abstaining is accompanied by a declaration, which comes to the same thing. But, further, the statute places the question of right of way on a continuity of user: the declarations may therefore be carried forward to, and connected with, the subsequent period of non-user, inasmuch as the statute must have the effect of connecting all that passes relatively to the user or non-user, during the continuous period. Since the statute, therefore, such declarations are on the footing of declarations made at the time of the subsequent non-user. Again, the statute appears to alter the law as to the effect of declarations of a tenant binding the reversioner. *Wood* v. *Veal* (*a*) shews that before

(*a*) 5 *B.* & *Ald.* 454.

the

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the statute they could not so bind him. But the statute has made the acquiescence by the tenant in an interruption during the period material; and it seems to follow that his declarations during the period must be evidence; for, since he may affect the reversioner by his acts of acquiescence, there is no reason that his declarations of acquiescence should not affect him also. The statute, in effect, substitutes the occupier for the reversioner, so far as the question of user or non-user is concerned. [*Patteson* J. Before the statute, the acts of tenants might be evidence against the reversioners, yet their naked declarations were not so.]

As to the last issue. It has been attempted to treat the question as if the evidence of payments were offered for the purpose of shewing the origin of the easement. For that purpose it might be inadmissible. But it is offered to shew the nature of the enjoyment, and that it was not an enjoyment by a person claiming as of right. It is a fact inconsistent with the simple fact of such enjoyment. But it could not be pleaded in bar, even if there had been a stipulation in writing for payment; for such a plea would not confess the enjoyment as of right, and avoid it, by shewing that it was under an agreement. Such a confession and avoidance could be pleaded only where the agreement would cover and be applicable to the whole period of enjoyment: the statute, therefore, when it directs that a contract or agreement shall be specially pleaded, and also provides that it must be by deed or in writing, refers only to contracts which account for, and are consistent with, the fact of an enjoyment as of right during the whole period; and, consequently, to such contracts only as are antecedent to the beginning of the enjoyment. The legislature

legislature cannot have intended, by the second section, that an enjoyment for forty years by leave and licence is to confer an absolute right, even though the leave and licence was given during the term. Yet, if they did not mean that, evidence of the leave and licence must be admissible under the general traverse, since, as has been shewn, it could not be pleaded in bar. Supposing that, on each occasion of user, the party using had asked leave, or had declared that he did not claim as of right, surely this must have been evidence under the general traverse. But what is the difference between a leave given *toties quoties*, and a leave for a definite period? In *The Monmouthshire Canal Company* v. *Harford* (*a*) applications for leave, and the granting of a parol licence, were held admissible upon a traverse of a plea of twenty years' enjoyment, although, in that case, the statute does not prevent the pleading of a parol contract in bar, as it does in the case of a forty years' enjoyment. Such evidence in fact shews that neither the enjoyment before, nor that after, the leave given, was of right. The payment of the penny cannot make the case different from that of a gratuitous licence. So *Parke* B. in *Bright* v. *Walker* (*b*) says that if the claimant "shall have occasionally asked the permission of the occupier of the land — no title would be acquired." [*Patteson* J. Do you say that by replying a deed, when one exists, a party denies the enjoyment as of right, or that he confesses it? If he deny it, how can it be matter of special replication? if he confess it, is that reconcileable with your argument, that proof of licence

(*a*) 1 *Cr. M. & R.* 614. *S. C.* 5 *Tyrwh.* 68.
(*b*) 1 *Cr. M. & R.* 219. *S. C.* 4 *Tyrwh.* 509.

supports

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supports the traverse of the enjoyment as of right?] It is, perhaps, difficult to construe all the provisions of the statute consistently with the strict rules of pleading. But the true construction seems to be that, if a deed, explaining the whole enjoyment, were specially pleaded, that would be a confession that the enjoyment, during the whole period, had been of right; but it would be an answer to that case of enjoyment as of right which appeared primâ facie on the other side. But, if a licence were proved to have been asked and given during the period, that would shew that, till the licence was given, and after it had expired, there was no enjoyment at all as of right; and this, even on the supposition that an enjoyment under such a licence is, in the statutable sense, an enjoyment as of right. In fact, the argument on the other side must be carried to this length; that, if the party claiming the easement prove by a witness the simple fact of user for forty years, the opposite party cannot cross-examine such witness as to the nature and circumstances of the user.

Cur. adv. vult.

Lord DENMAN C. J. in this term, *February* 1st, delivered the judgment of the Court. After having stated the pleadings, his Lordship proceeded:—

At the trial, it was proposed, on the part of the defendant, to shew that a parol agreement had been made, and consideration paid for passing, in the year 1798. This evidence was offered on the first issue (*a*), to negative the enjoyment for forty years *as of right*. And it was also offered on the second issue (*b*), as of itself

(*a*) The issue on the third plea.

(*b*) The issue on the second plea.

shewing

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shewing an interruption acquiesced in, or at all events as explanatory of the character of a cessation to use the way for four years, commencing in 1800, which cessation was proved, and ascribed by the defendant to interruption, but by the plaintiff to a voluntary abstinence from user, on account of the close being in tillage. The evidence was rejected, and the plaintiff had a verdict. A rule nisi for a new trial on the ground of that rejection having been granted, the case was argued in last *Michaelmas* term.

The question turns upon the second and fifth sections of stat. 2 & 3 *W.* 4. *c.* 71., which the Court is called upon to construe, with reference both to the law and the form of pleading; and, in so doing, we have the assistance of the cases of *Bright* v. *Walker* (*a*), and *The Monmouthshire Canal Company* v. *Harford* (*b*), in which this act of parliament came under the consideration of the Court of Exchequer.

The second section of the act is in the following words (his Lordship here read the second section of the act), and the fifth section in the following (his Lordship here read the fifth section).

The greatest difficulty arises from the language of the concluding paragraph of this section, and more particularly from the words "or any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment." As all these matters are required to be specially pleaded, and forbidden to be given in evidence under a general traverse of the enjoyment as of right, it is plain that they are treated by the legislature as consistent with such an enjoyment; and

(*a*) 1 *C. M. & R.* 211. *S. C.* 4 *Tyrwh.* 502.
(*b*) 1 *C. M. & R.* 614. *S. C.* 5 *Tyrwh.* 68.

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as, by the rules of pleading and of logical reasoning, every allegation by way of answer, which does not deny the matter to which it is proposed as an answer, is taken to confess it, we must conclude that the legislature used the words "as of right" in such a sense, as that a party confessing the enjoyment "*as of right*" for forty years or twenty, as the case may be, may account for and avoid the effect of it by alleging in the one case a consent or agreement, provided it be by deed or writing (see sect. 2), and in the other any contract &c. written or parol (see section 5). It follows that the words *as of right* cannot be confined to an adverse right from all time as far as evidence shews; for, if they were so confined, such enjoyment, once confessed, could not be avoided by replying that it was held by contract, which is not adverse. Again, as the legal right to a way cannot pass except by deed, it is plain that the words "enjoyment as of right" cannot be confined to enjoyment under a strict legal right; for then a "consent or agreement" in "writing," *not under seal*, of which the second section speaks, could not account for such enjoyment. The words, therefore, must have a wider sense; and yet they must have the same sense as the words "claiming right thereto" in the second section, otherwise there will be incongruities in the construction of the act. It seems, therefore, that the "enjoyment as of right" must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion or even on many occasions of using it; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right, whether strictly legal

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legal by prescription and adverse user or by deed conferring the right, or, though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal, in case of a plea for forty years, or by such writing or parol consent or agreement, contract or licence, in case of a plea for twenty years. According to this view of the act, a licence in writing must be replied to a plea of forty years' enjoyment, if it cover the whole time, and the same of a parol licence in case of a plea for twenty years.

But it was argued by the Attorney-General, that each leave given, in case of permission repeatedly asked, is as much a consent or agreement pro hâc vice as a consent or agreement for twenty years, and therefore, according to this view of the act, ought to be replied, which is contrary to the decision of the *Monmouthshire Canal Company* v. *Harford* (*a*). On looking at the report of that case, we find that the decision rests on this ground, viz. that the asking leave from time to time *within* the forty or twenty years, breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that, at that time, the asker had no right; and, therefore, the evidence of such asking *within* the period is admissible under a general traverse of the enjoyment for forty or twenty years as of right. To this ground of decision we quite accede; and it will follow that, not only an asking leave, but an agreement *commencing within the period*, may be given in evidence under the general traverse, notwithstanding the words of the fifth section; for the party cannot and does not

(*a*) 1 *Cr. M. & R.* 614. *S. C.* 5 *Tyrwh.* 68.

rely

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rely on it as an answer to an enjoyment as of right which he confesses, nor as avoiding any such enjoyment during the time covered by the agreement; but as shewing that there was not, at the time when the agreement was made, an enjoyment as of right; and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years.

The evidence proposed ought therefore to have been received on the first issue; and, on the second, it may also have been admissible, to shew that the cessation to use was by reason of want of right, and not from voluntary abstinence.

The rule for a new trial must therefore be made absolute.

Rule absolute (*a*).

(*a*) See *Beaseley* v. *Clarke*, 2 *New Ca.* 705.

Tuesday, January 12th.

The KING *against* GEORGE HENRY WARD, Esquire.

On the trial of an indictment for a nuisance in a navigable river and common king's highway, called the harbour of *C.*, by erecting an embankment in the waterway, a finding by the jury that the embankment was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, amounts to a verdict of Guilty.

It is no defence to such an indictment, that, although the work be in some degree a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the port.

INDICTMENT, stating that the *Medina* river was an ancient navigable river and common King's highway for all the liege subjects, &c., with vessels, boats, &c., to pass, repass, and navigate, &c., and that the defendant, in a certain part thereof called *Cowes* harbour, upon the soil and in the waterway of the said

river

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The KING *against* WARD.

river and highway, did erect and continue a certain building of stones, &c., across the stream and waterway of the said river, by reason whereof the liege subjects, &c., could not pass, repass, and navigate, &c., as they before used, and of right ought, &c. (*a*). Plea, Not Guilty. This indictment was tried before Lord *Denman* C. J. at the *Winchester* Summer assizes, 1834. The principal points of the case, as stated by his Lordship in delivering judgment upon the motion made to set aside the verdict as after mentioned, were as follows: —

The subject of indictment was a causeway projecting into the water, and raised on a kind of platform. The causeway originally was of gravel, shingle, and stone, called a hard, and went sloping down to the water. The defendant's father had sued out a writ of ad quod damnum, under which the proceedings were regularly conducted to their close; then he removed the causeway, and made a new one along the water's edge, considerably to the South. In the year 1833, this new causeway or wharf (*b*) was considerably lengthened in the same direction, which was inwards up the harbour. It was also then first raised on piles, and much heightened, and, instead of sloping down, it is now, at the extremity, five feet four inches higher than the shore.

The indictment was preferred by the corporation of *Newport*, on the complaint of the harbour master and water bailiff, who are sworn to present nuisances in the harbour. The case which the prosecutors sought to

(*a*) See the indictment more fully set out at the end of this case.

(*b*) There was a wharf in front of the *Fountain Inn* (not complained of) with which the causeway communicated; see p. 387, post. The counsel on both sides treated the wharf and causeway a distinct.

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establish may be taken from the following passage, which I copy from my note of the harbour master's evidence: — 'The causeway is decidedly an inconvenience to the navigation. Small vessels of twenty-six or twenty-eight tons are much obstructed in their tacking, when making their way up to *Newport* with the tide. They were in the habit of using a setting-pole, which this prevents, and sends them out into the best (*a*) of the water.' He described also some inconvenience to which square-rigged vessels, lightermen, and row-boats were exposed in consequence of the present state of the causeway, both as to navigation and landing. Many witnesses were called in support of these allegations. On the defendant's part, some witnesses denied the existence of these inconveniences altogether; others represented them as very trifling. But he mainly placed his defence on the advantages obtained by the public from the general result of the alteration, which were thus described by the captain of a steam-boat: — 'I consider the alteration a great benefit to the public; first, in launching and landing boats more readily; secondly, steam-boats' (and of course other vessels) 'can approach where they could not; thirdly, vessels obtain shelter from the quay.' And these results were hardly disputed on the part of the prosecution. The learned counsel cited *Rex* v. *Russell* (*b*), and *Hale, De Portibus Maris*, p. 85. (*c*).

In summing up the evidence after a long trial, I asked the jury to state their opinion whether the causeway in its altered state was a nuisance to the navigation of the

(*a*) The witness explained this to mean the deepest.

(*b*) 6 *B.* & *C.* 566.

(*c*) Ch. 7. *Hargrave's Law Tracts.*

river:

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river; and whether the public benefit was greater than the inconvenience. The jury, after deliberation, stated that an impediment had been created; but I declined to receive that expression, as not necessarily equivalent to the word nuisance, which might be too trifling in degree to be properly so called. They said at length that they considered it to be a nuisance; but they added, both at first and at last, that the inconvenience was counterbalanced by the public benefit arising from the alteration made by the defendant.

In addition to the facts recapitulated as above by the Lord Chief Justice, the following particulars were stated at the trial, some of which were adverted to in argument upon the after-mentioned rule: — The causeway built by Mr. *Ward* the father was erected in 1823. The whole was the defendant's private property. It was represented, on behalf of the prosecution, that the causeway extended below low water mark. On the defendant's part, this was denied to be the case, except at particular tides. The way from the present causeway into the town of *Cowes* was either through the *Fountain Inn*, which was Mr. *Ward*'s property, or under an archway, formed by part of the *Fountain* premises. The latter passage, and the causeway, were open at all times for landing and embarking. It was stated as probable that the number of persons using the causeway for those purposes, in a year, amounted to 50,000. Steam-boat proprietors paid 2*d.* for each passenger landing and embarking, which amounted to 200*l.* a year (*a*). Other persons landed and embarked without paying. Instances were mentioned,

(*a*) It was represented, on behalf of the defendant, that the payments mentioned were required at the wharf only, and that the causeway (as distinguished from the wharf) was free.

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in which persons going to and from a particular steamboat had been forbidden to land where the other steamboat passengers landed; but this appeared to have taken place at the wharf, and before the defendant's time. Cattle and goods landed, or going out, were paid for, but not in all instances. There are other places in *Cowes*, where persons are at liberty to land and embark at all times, but no other where it is always convenient to do so. Some evidence was given (but contradicted by the defendant's witnesses) to shew that the causeway had occasioned accumulations of sand and mud in parts of the harbour. In answer to the evidence adduced to shew that the causeway narrowed the space for tacking, and thereby interfered with the navigation, it was stated that there was a line of moorings farther out in the stream than the end of Mr. *Ward*'s causeway, on the same side, and a similar line on the opposite side; that pilot and other vessels constantly lay at these moorings; that the space between them and the shore was usually occupied by small boats; and that the regular course for vessels going up the *Medina* was between the two lines of moorings. But it was also stated that vessels tacking often kept their course as far as the depth of water would allow; that, at the place in question, the harbour was very narrow, and the tide strong, and that it was often important for vessels working in or out to have an opportunity of making as long tacks as possible. *Follett*, in addressing the jury for the defendant, insisted, not only upon the usefulness of the work in question to the harbour, but also upon the benefit conferred by it on the *Isle of Wight* generally, in favouring the resort of visitors.

On the above finding of the jury, *Follett*, in the ensuing

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ensuing term, obtained a rule to shew cause why a verdict of Not Guilty should not be entered, on the ground that the finding amounted to an acquittal In the last term (*a*),

Erle and *Sewell* shewed cause. The benefits arising from this work are either inconsiderable, or felt only by a portion of the public. They are for the most part received only at particular seasons, whereas the obstruction is constant. No permanent right of access to this causeway is given to the public: some persons have been warned off; others pay to embark or disembark. And, supposing that the defendant had dedicated the causeway to the public as far as lay in him, it does not appear that his own right to the soil was more than temporary, in which case there could be no dedication unless the owner of the fee consented; *Wood v. Veal* (*b*). The act of erecting this causeway was not done in immediate exercise of any of the rights appertaining to a port, as the right of passage, of landing and embarking, of fishing, or of staying for shelter or to take in goods, although it might ultimately favour the enjoyment of those rights. The immediate act was a nuisance to known vested rights, and is not to be justified by a reference to distant results, or advantages to be reaped by a different part of the community from that which suffers the inconvenience. No authority, unless it be *Rex* v. *Russell* (*c*), contradicts this proposition. In that case the

(*a*) *November* 18th. Before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

(*b*) 5 *B* & *Ald.* 454.

(*c*) 6 *B.* & *C.* 566. In answer to an inquiry made by the Court, as to this case, at the beginning of the present argument, *Cresswell* stated that

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the defendant's counsel mainly relied upon *Hale, De Portibus Maris*, part ii. c. vii. (*a*). Lord *Hale* there gives several examples of nuisances "common to all men that have occasion to come, go, or stay at ports." The fourth of these is "the building of new wears or inhancing of old, whereby navigation or passage of vessels is obstructed." That is stated absolutely, and without limitation, as a head of nuisance. It may be said that in the following paragraph, where he gives, as a fifth instance, "the straitening of the port, by building too far into the water, where ships or vessels might have formerly ridden," he adds, "for it is to be observed, that nusance or not nusance in such case is a question of fact." But the preceding instance is stated positively, and without qualification, as one of nuisance. In this fifth paragraph, Lord *Hale* merely shews that, where a structure is erected below the high water or the low water mark, it is not *therefore* inevitably a nuisance; as, for example, if it be built in a place where the water flowed among shallows: and undoubtedly other instances of the same kind might be put, where the structure could not possibly be a nuisance. *Hale*'s conclusion is that, in the case "of building within the extent of a port in or near the water, whether it be a nusance or not is *quæstio facti*, and to be determined by a jury upon evidence, and not *quæstio juris*." The jury are

a fresh indictment had been preferred against Mr. *Russell*, raising the same question as before; that the cause had been tried at the *Carlisle* assizes before *Hullock* B., and certain facts found by the jury, which were to have been made the basis of a special verdict; but that, in consequence of the death of the learned Judge, difficulties had arisen in settling the verdict, and the case had not proceeded; one cause of which was, that the question had been rendered less important by the general use of steam-boats for towing.

(*a*) *Harg. Law Tracts*, 85.

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to say whether or not the thing complained of is a nuisance to any right existing, and which can be known at the time. Here the jury have found Mr. *Ward*'s causeway to be such a nuisance; and, if that has been rightly found within the meaning of the passages of *Hale* referred to, it is no answer to say that some benefit is produced. A nuisance is, in the contemplation of the law, criminal; and it is against first principles to say that there can be a compensation or set-off for a crime. In *Rex* v. *Lord Grosvenor* (*a*), also referred to in *Rex* v. *Russell* (*b*), *Abbott* C. J. left it to the jury, "whether the convenience of the public at large, or of that portion of it which is interested in the navigation of the river *Thames* has been affected or diminished by this alteration." He does indeed say, "The public have a right to all the convenience which the former state of the river afforded, unless by the change some greater degree of convenience is rendered." But the mode of putting the case there was consistent with the construction just given to the passages in *Hale*. The question substantially laid before the jury was, whether, considering the advantages arising from the existence of the recess which had been blocked up, the public had, upon the whole, any beneficial right in its continuance. The Lord Chief Justice was evidently of opinion that if, at the time of the erection, the public was deriving any benefit from the state of things interfered with by the act of the defendants, they were not entitled to take that benefit away. He says, at the end of his address to the jury, "The question is, whether if this wharf be suffered to remain, the public convenience

(*a*) 2 *Stark. N. P. C.* 511. (*b*) 6 *B.* & *C.* 566.

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will suffer." — "Although the benefits which were enjoyed before the erection, were limited to particular times and seasons of the weather, and were enjoyed but occasionally, yet the public is not to be deprived of them by the erection of a wharf for mere private convenience." His Lordship did not there look to any but the immediate effects of the alteration; and, even if a wider construction could be given to his language, the question put by him could be carried no farther than this; whether the public, formerly exercising the right said to be taken away, reaped greater benefit from the alteration, than the same public had derived from the original state of things. But even that construction would not affect the present question; for not only are the injury and benefit not *ejusdem generis*, but one portion of the public suffers, and another receives the compensation.

There does not appear to be any authority upon the point since this case, except *Rex* v. *Russell* (*a*). In that case there were peculiar circumstances. The staiths had in some degree been recognised by an act of parliament, which gave the public certain rights in resorting to them, and so far made them a matter of public concern. Besides, the question being whether or not the staiths were a nuisance to the navigation of the river *Tyne*, it was proved that they benefited it in one respect, namely, by clearing it of keels. The alleged injury to the navigation was attended by a direct benefit to the navigation. Lord *Tenterden* thought that, if the case had been left to the jury entirely upon the question of injury to the navigation, and a verdict found for the

(*a*) 6 *B.* & *C.* 566.

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defendants, no objection could have been taken. It is true that *Bayley* and *Holroyd* Js. thought that *Bayley* J. had properly directed the jury, in his summing up, to take into their consideration advantages accruing to distant portions of the community; but Lord *Tenterden* was of a different opinion. This case was relied upon in argument in *Rex* v. *Pease* (*a*); but the Court, there, treat the decision as questionable. The authorities cited for the prosecution in *Rex* v. *Russell* (*b*) shew that an individual cannot justify interfering with public rights of his own authority, even where it may be alleged that in so doing he has given some benefit to the public; *Rex* v. *Warde* (*c*), *Payne* v. *Partridge* (*d*). In *Hind* v. *Manfield* (*e*) it was laid down, without qualification, that an individual could not divert part of the river *Thames*, and thereby weaken the current, without an ad quod damnum, "because that river is as an highway."

To allow the kind of defence attempted in this case would introduce very inconvenient inquiries. For example, it is alleged that the work complained of promotes the general prosperity of the *Isle of Wight*, by favouring the resort of visitors and giving an impulse to trade and to improvements. How can a jury try such a question? They can estimate the injury done in a particular quarter; but the benefit which may be indirectly conferred upon places at a distance is too wide a subject for them to enter upon. So, in *Rex* v. *Russell* (*b*), it was said that the coal staiths produced an ultimate benefit to the inhabitants of *London*; but a *Northumberland* jury could not judge of that. Nor is the principle a just one,

(*a*) 4 *B.* & *Ad.* 30.
(*b*) 6 *B.* & *C.* 566.
(*c*) *Cro. Car.* 266.
(*d*) 1 *Salk.* 12.
(*e*) *Noy*, 108.

that

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that a nuisance in one place may be compensated by any degree of benefit conferred in another; as if a gasometer created a nuisance in *Southwark*, and it was answered that the gas lights connected with it were beneficial to a street in *London*. No comparison can be instituted between accommodation to one set of persons, and loss of rights to another. And where would this kind of justification stop? If an actual benefit may be alleged, so may an intended benefit. A man may erect a causeway which will be convenient to steam-boats in a place where none are used, but where he says he will establish them; or he may turn an ordinary highway into a railway, and justify it by the increased convenience to those who will use steam carriages; which, however, according to the judgment of Lord *Tenterden* in *Rex* v. Sir *John Morris* (*a*), would be no excuse. [*Patteson* J. The present question was not much considered there: Lord *Tenterden* held, that the doctrine said to be established by *Rex* v. *Russell* (*b*) was not applicable; and his observation, which has been referred to, was this:—"It is said, indeed, that all persons may use this railway who will pay for so doing; but no man has a right to tell the public that they shall discontinue the use of such carriages as they have been accustomed to employ, and adopt another kind, in order to pass along a new description of road, paying him for the liberty of doing so."]

Sir *W. W. Follett* and *Bere*, contrà. The real question is, not whether a person may obstruct the navigation of a harbour, and look, for his justification, to

(*a*) 1 *B. & Ad.* 447. (*b*) 6 *B. & C.* 566.

advantages

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advantages resulting in other places; but whether he may not erect a structure in a port, which is an impediment to the navigation, but which is, on the whole, a benefit to that port. (They commented at length upon the facts proved, with reference to these points.) The question, how far the public had acquired a right to use the causeway, went to the jury as part of the question of benefit. The taking of two-pence from the steam-boat passengers did not disprove the right: that payment was made for landing at the wharf. As to the causeway, the evidence for the prosecution did not establish that any restriction of this kind existed. The doctrine of *Rex* v. *Russell* (*a*) need not come under discussion; nor is there any conflict of authorities. Erections may be made in a harbour, below high water mark, and in places were vessels might perhaps have sailed; and the question whether they are a nuisance, or not, will depend on this,—whether, upon the whole, they produce public benefit; not giving to the terms "public benefit" too extended a sense, but applying them to the public frequenting the port. If this view of such cases were not admitted, every wharf in the port of *London*, perhaps, would be a nuisance, because it occupied a space over which some boat might have been punted; and no lapse of time could render it legal. Suppose the *Plymouth* Breakwater to have been erected by an individual; could that be called a nuisance to the port? It impedes the navigation, but the benefit to the port counterbalances that inconvenience. The same may be said of the Cobb at *Lyme*. Suppose a harbour had in it a shoal, which might be sailed over at high water, but was dan-

(*a*) 6 *B.* & *C.* 566.

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gerous at other times, and a vessel were moored there to point it out: that would not be a nuisance, but a cause of safety. There is a fallacy in comparing this case with that of a highway. A highway is for passage only; and, in general, that which impedes the passage is a nuisance to the highway. But a port is not merely a place of passage: "A *port* is a haven, and somewhat more. 1st, It is a place for arriving and unlading of ships or vessels." *Hale, De Portibus Maris*, part ii. c. ii. (*a*). An erection made in a port, though it impede the passage, is not necessarily a nuisance, because the public has other and more important rights in a harbour than that of passage, and to these the thing done may be advantageous; and whether, taking these into consideration, the erection be a nuisance or not, is a question for the jury. This is laid down in the judgment of *Holroyd* J. in *Rex* v. *Russell* (*b*). Here the question has been decided by a jury in the defendant's favour. Lord *Hale* (*De Portibus Maris*, part ii. c. vii. (*c*)) mentions as a nuisance common to all men using a port, "the building of new wears or inhancing of old, whereby navigation or passage of vessels is obstructed." The argument for the prosecution in this case is, in effect, that every building which at all straitens the passage is within this clause. But Lord *Hale* goes on to add, as another instance, "the straitening of the port, by building too far into the water, where ships or vessels might have formerly ridden;" and he proceeds, "for it is to be observed, that nusance or not nusance

(*a*) *Harg. Law Tracts*, 46.

(*b*) 6 *B. & C.* 586, 587. Sir *W. W. Follett* here read the passage beginning, "But, independently of these statutes;" and ending, "in law a nuisance."

(*c*) *Harg. Law Tracts*, 85.

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in such case is a question of fact. It is not therefore every building below the high-water mark, nor every building below the low-water mark, is *ipso facto* in law a nusance; for that would destroy all the keys that are in all the ports in *England*. For they are all built below the high-water mark; for otherwise vessels could not come at them to unlade; and some are built below the low water mark. And it would be impossible for the King to license the building of a new wharf or key, whereof there are a thousand instances, if *ipso facto* it were a common nusance, because it straitens the port, for the King cannot license a common nusance. Nay, in many cases it is an advantage to a port to keep in the sea-water from diffusing at large; and the water may flow in shallows, where it is impossible for vessels to ride. Indeed, where the soil is the King's, the building below the high-water mark is a purpresture, an incroachment and intrusion upon the King's soil, which he may either demolish or seize, or arent at his pleasure; but it is not *ipso facto* a common nusance, unless indeed it be a damage to the port and navigation. In the case therefore of building within the extent of a port in or near the water, whether it be a nusance or not is *quæstio facti*, and to be determined by a jury upon evidence, and not *quæstio juris*." The whole result of this and other authorities is that, although the port may be straitened, the question, nuisance or no nuisance, is for the jury upon the whole of the facts. Even in the case of a high road, it is not true that every obstruction to the right of passage is a nuisance. The public may have other rights on a highway. A market or fair is in many instances lawfully held in a public street. A hoard placed in front of a building while it undergoes

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undergoes repair is not a nuisance, though it obstructs the highway.

In *Rex* v. *Lord Grosvenor* (*a*) *Abbott* C. J., in his summing up, said, "The question is not whether any private advantage has resulted from the alteration to any particular individuals, but whether the convenience of the public at large, or of that portion of it which is interested in the navigation of the river *Thames* has been affected or diminished by this alteration." The defendant here relies upon the benefit reaped by the public, and not upon any private advantage, nor does any accrue to him. The present case does not involve any point on which the Court differed in *Rex* v. *Russell* (*b*). *Bayley* J. there says, in delivering judgment (*c*), "The only point upon which our difference rests is, I believe, the point of public benefit; not the point *upon the preponderance of public benefit*, but the question, what might be taken into consideration as matter of public benefit?" Lord *Tenterden* differed from the other judges, not as to the principle sanctioned by Lord *Hale*, that the jury are to consider, upon a view of all the circumstances, whether or not the benefit to the public preponderates over the injury, but merely as to an ingredient in that preponderance, namely the convenience afforded to the trade of *London*. [*Coleridge* J. Lord *Tenterden* said there (*d*) that the question raised by the indictment was properly, whether the *navigation* and passage of vessels on the *public navigable river* was injured by these erections.] The general principle of compensation has scarcely been disputed in this case; but the compensation is said to be too re-

(*a*) 2 *Stark. N. P. C.* 518.
(*b*) 6 *B. & C.* 566.
(*c*) Page 593.
(*d*) Page 602.

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mote and indirect. It has, indeed, been said that there can be no compensation for a crime; but the question here is, whether any crime has been committed; and the crime in question is nuisance to the port. [*Erle.* The indictment is for obstructing a navigable river and King's highway.] It adds the words "called *Cowes Harbour*." And the mere wording could not alter the question whether or not a nuisance to the port had been committed. The concluding part of the address to the jury by *Bayley* J. in *Rex* v. *Russell* is thus stated by *Holroyd* J. (*a*). "If you think this is placed not in a reasonable part of the river, that it does an unnecessary damage to the navigation, or that this is not of any public benefit, *or that the public benefit resulting from it is not equal to the public inconvenience which arises from it*, then you will find your verdict for the Crown." It is sufficient to contend, here, that the last part of the alternative was correctly put. And Lord *Tenterden* said afterwards (*b*), "the question raised by this indictment"..... "I take properly to have been, whether the navigation and passage of vessels on this public navigable river was injured by these erections. Upon this question there was evidence on both sides, regard being had to that obstruction, which must necessarily take place by the transfer of coals from keels or other vessels confined to the navigation of the river, into ships of a different kind passing to sea. And if the question had been left entirely in this form, and a verdict found for the defendants, I do not, as at present advised, see that any objection could have been properly made to it. In some parts of my learned brother's direction to the jury,

(*a*) 6 *B.* & *C.* 593. (*b*) 6 *B.* & *C.* 602.

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and especially toward the close, the case appears to have been left mainly on this ground. But in other parts, remarks were made on the public benefit of the nature that I have alluded to, which might probably, in my judgment, have an effect upon the minds of the jury, coming as they did from so high and from so respectable an authority, that I think ought not to have been produced." Lord *Tenterden* nowhere intimates an opinion that a verdict ought to be entered for the Crown; and yet the fact of obstruction was more unequivocal in that case than in the present. The argument at the bar, there, had turned mainly upon the point that the alleged compensation did not take effect in the proper quarter. In *Rex* v. *Pease* (*a*) (though it is not necessary to assimilate the case of a port to that of a high road) the principle, if rightly applied, of compensation, seems to have been held reasonable at least. And here it is not questioned that there was a compensation to the public frequenting the harbour of *Cowes* for the impediment created in the harbour by the defendant's causeway.

Lord DENMAN C. J. My understanding at the trial certainly was, that the question was much the same as that in *Rex* v. *Russell* (*b*), a case, the authority of which has been much doubted, and is perhaps likely to be more so as it is further examined. Lord *Tenterden* there did not accede to the doctrine of compensation laid down by *Bayley* J. in his direction to the jury, nor does *Holroyd* J. appear to have adopted it. And I must say that, if the violation of rights which belong to any part of the public is to be vindicated by the benefit which

(*a*) 4 *B.* & *Ad.* 30. (*b*) 6 *B.* & *C.* 566.

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may arise to another part of the public elsewhere, we are introducing inquiries of a most vague and unsatisfactory nature, and entering into speculations upon which no jury can be properly expected to decide. However, the defendant's counsel have, in this argument, proceeded upon a narrower ground than that taken in *Rex* v. *Russell* (*a*).

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. After stating the nature of the indictment, and the principal facts of the case, the questions left to the jury, and the verdict, (for which see page 385–7, antè,) his Lordship proceeded as follows:—

Sir *William Follett* obtained a rule of this Court for entering a verdict of Not Guilty, on the ground that the finding amounts to an acquittal. And this conclusion would probably be found irresistible, if the case of *Rex* v. *Russell* (*a*) was well decided by the majority of this Court, or rather if the direction of the learned Judge who tried that indictment, correctly laid down the law.

That learned Judge concluded his address to the jury in these terms:—

"If you think this is placed not in a reasonable part of the river, that it does an unnecessary damage to the navigation, or that this is not of any public benefit, *or that the public benefit resulting from it is not equal to the public inconvenience which arises from it*, then you will find your verdict for the Crown. If on these points you are of a different opinion, then for the defendants." In substance, therefore, it should seem that the jury were directed to find the defendant Not Guilty, if his act, in-

(*a*) 6 *B.* & *C.* 566.

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dicted as a nuisance, were productive of more public benefit than public inconvenience.

The greatest weight is due to the authority of Mr. Justice *Bayley*, who thus charged the jury, and afterwards upheld his opinion in this Court; and no person can hesitate to ascribe every quality of an excellent Judge to Mr. Justice *Holroyd*, who agreed with him in thinking that the rule for a new trial for misdirection ought to be discharged. But, when we examine the grounds of this opinion, as delivered by the latter, they will not be found to support in any degree the proposition just noticed in the summing up; on the contrary, he plainly considers the topic to have been introduced as an answer to some observations invidiously made to the defendant's prejudice, by the Counsel who conducted the prosecution, and thinks that it must be qualified throughout the summing up, and even to its close, by its connection with that argument. Mr. Justice *Bayley* himself, who delivered his judgment after Mr. Justice *Holroyd*, takes a much wider range, maintaining the right to estimate the balance of public benefit and public inconvenience, and to take into the account of the former the advantages that may be derived from the change by any part of the public. He takes for an example the purchasers of coals, sent from the indicted staith to a distant market. Lord *Tenterden* thought it wrong to submit such extensive views to the jury, and that the question ought simply to have been, "whether the navigation and passage of vessels over this public navigable river was injured by those erections."

Lord *Tenterden*'s dissent must be allowed to detract greatly from the authority to be ascribed to the direction given at Nisi Prius, which his Lordship was evidently anxious

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anxious to sustain if possible: and, when it appears that *Holroyd* J. founds his support of the direction on a distinction which excludes the general principle now contended for and avowed by *Bayley* J., the case of *Rex* v. *Russell* (*a*) will appear to rest on the single authority of that learned Judge, acting at Nisi Prius, and satisfied on reflection with the course which he had then taken. It is observable also that of the distinguished counsel who opposed the rule for a new trial in *Rex* v. *Russell* (*a*) and who have addressed us on the present occasion, none have maintained that the direction there given was altogether conformable to law.

If indeed it were, we may well feel some surprise that the doctrine appears there for the first time; certainly no trace of it has been discovered in any law book of an early date, but the cases quoted from *Cro. Car.* and *Salkeld* display a strong repugnance to it. The first glimpse of it is detected in some expressions employed by Lord *Tenterden*, in *Rex* v. *Earl Grosvenor* (*b*). His Lordship there lays it down, that "the public have a right to all the convenience which the former state of the river afforded, *unless by the change some greater degree of convenience is rendered.*" Vessels are entitled, he says, to the advantage of shelter, "unless the want of it be *compensated by some superior advantage resulting from the alteration.*" Hence it is inferred that, if the public had derived any new convenience from the change, which a jury should think greater than that which the nuisance took from them, or if some advantage superior to that of shelter had resulted from the destruction of that shelter, his Lordship would have directed an acquittal. But this by no means follows; for all who have studied the course

(*a*) 6 *B.* & *C.* 566. (*b*) 2 *Stark. N. P. C.* 514.

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adopted by that learned and cautious Judge are well aware that his habit never was to lay down a larger proposition of law than the case in hand required. It is evident that, in Lord *Grosvenor*'s Case, which was that of an embankment raised by an individual for his own profit, the only question which he thought necessary to be submitted to the jury,—viz., whether the public had benefited by the alteration made, — was plainly confined to such benefits as the public might have derived from it, in the exercise of that very right, the invasion of which was treated as a nuisance. If he had contemplated the doctrine of *Rex* v. *Russell* (*a*), he would have told the jury to consider whether that part of the public which consisted of the frequenters of the wharf had not gained more than the navigating part of the public had lost, by means of the erection made. But even if the language employed had comprehended in its terms all possible modes of compensation, Lord *Tenterden*'s judgment in *Rex* v. *Russell* (*a*) plainly shews what his deliberate view of the law was, and that the advantage gained ought to be closely connected with the inconvenience resulting; or rather with that which would have been an inconvenience if it were not absorbed in the superior advantage. This is most apparent, from what is ascribed to him in p. 602.

In this view of the law my brother *Littledale* authorises me to say that he fully agrees, though his connection, when at the bar, with the case of *Rex* v. *Russell* (*a*) induced him to take no part in that decision.

And in the infinite variety of active operation always going forward in this industrious community, no greater evil can be conceived than the encouragement of capi-

(*a*) 6 *B.* & *C.* 566.

talists

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talists and adventurers to interfere with known public rights, from motives of personal interest, on the speculation that the changes made may be rendered lawful by ultimately being thought to supply the public with something better than what they actually enjoy. There is no practical inconvenience in abiding by the opposite principle, for daily experience proves that great and acknowledged public improvement soon leads to a corresponding change in the law, accompanied, however, with the just condition of being compelled to compensate any portion of the public which may suffer for their advantage.

In the recent argument, the doctrine of compensation for nuisance was supported by one analogy only. Mr. *Bere*, comparing the right of navigation over a waterway to that of walking along the street, observed that the latter was sometimes interrupted by the exercise of other rights, as when a hoard is erected for repairing a house. But it rather appears that the hoard is placed for the safety of those possessing the right of way: it protects them from inevitable danger if it leaves them a free passage, and sends them another way if the whole street is necessarily obstructed. Every way to which houses adjoin must be considered as set out subject to these occasional interruptions, which resemble the temporary acts of loading coals in keels, alluded to in *Rex* v. *Russell* (*a*). A permanent hoard would be abatable as a nuisance; and it much resembles the staith in *Rex* v. *Russell* (*a*), the wharf in Lord *Grosvenor's Case* (*b*), and the quay, for which this indictment was preferred.

But the learned counsel contended that they did not

(*a*) 6 *B.* & *C.* 566. (*b*) 2 *Stark. N. P. C.* 511.

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want the authority of *Rex* v. *Russell* (*a*), and could establish their right to a verdict of Not Guilty, on the finding of the jury, from a consideration of the nature of the place where the nuisance is charged. They say that the river *Medina*, as described in the indictment, is not merely a navigable river but a port, *Cowes Harbour*, and they rely on the various rights that may exist together in such a place, and their unavoidable inconsistency at particular times. The same remark may, however, be true, with respect to a highway, where right of common of pasture, and right of common of turbary, may exist at the same time. It is still more strikingly true in respect of navigable rivers, from which it seems impossible to distinguish the case of ports, in principle, though the degree may perhaps be different. Where such rights happen to clash in questions brought before the Courts, the valuable maxim *sic utere tuo ut alienum non lædas* will generally serve as a clue to the labyrinth.

But the possible jarring of pre-existing rights can furnish no warrant for an innovation which seeks to create a new right, to the prejudice of an old one. There is no legal principle to justify this proceeding, unless *Rex* v. *Russell* (*a*) is well decided.

Recourse is then had to the great and venerable name of *Hale*, from whose excellent treatise *De portibus maris*, p. 85., some such words as the following may be extracted. It is not every building below the high water mark, that is, *ipso facto*, in law a nuisance, for that would destroy all the quays that are in all the ports of *England*. For they are built below the high water

(*a*) 6 *B.* & *C.* 566.

mark,

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mark, for otherwise vessels could not come at them to unload, and some are built below the low water. And it would be impossible for the King to licence the building of a new wharf or quay, whereof there are a thousand instances, if, *ipso facto*, it were a common nuisance. Nay, in many cases it is an advantage to a port to keep in the sea water from diffusing at large; and the waters may flow in shallows *where it is impossible for vessels to ride.*

But *Hale*, in this passage, is only disputing the doctrine "that every building below the low water mark is, *ipso facto*, in law, a nuisance;" which his observation on existing quays, and on such as may have been created under the King's licence, effectually disproves; and the argument is strengthened by the fact that, in some cases, such buildings are essential to the harbour being navigated at all. Here is no question of balancing nuisances; nor was the position intended to affect the general rule laid down by the same great authority at page 9. of the same treatise, that "all nuisances and impediments of passages of boats and vessels, though in the private soil of any person, may be punished by indictments." There is no incongruity in his afterwards asserting that the question of nuisance or no nuisance is for the jury; so Lord *Tenterden* considered it in *Rex* v. *Russell* (*a*), and gave the form in which he thought it ought to be submitted to them; and that is precisely the course taken on the trial of this indictment.

The jury, having answered my inquiry in the affirmative, have plainly found a verdict for the Crown, unless their added statement entitled the defendant to

(*a*) 6 *B.* & *C.* 566.

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an acquittal. For the reasons given, we think it did not, and that the present rule must therefore be discharged.

Rule discharged (*a*).

(*a*) The indictment in the present case was as follows.

1st Count. That the river *Medina*, otherwise called *Newport* river, is, and from time whereof &c. was, an ancient navigable river and common king's highway for all the liege subjects of our Lord the King with their vessels, boats, lighters, barges, and craft, to pass, repass, and navigate at their free will and pleasure, to wit, at the borough of *Newport*, in the *Isle of Wight*, in the county of *Southampton*; and that *George Henry Ward*, late of &c., Esquire, on the 1st day of *July* in the fourth year &c., 1833, with force &c., at the borough aforesaid, in a certain part of the said navigable river and common king's highway, called *Cowes Harbour*, in and upon the bed and soil of the same, and in the stream and waterway thereof, unlawfully, wilfully, knowingly, and injuriously, did erect, raise, and place, and cause to be erected and placed, a certain building composed of stones, timber, and other materials, of great length and width, viz. of the length &c., and of the width &c., projecting into and across the stream and waterway of the said navigable river and king's highway: and the said building, so as aforesaid erected, raised, and placed in the said river and common king's highway there, from the said 1st of *July* until the day of taking this inquisition, at &c. aforesaid, the said *G. H. W.* then and there unlawfully, &c., did continue, and still doth continue. By reason whereof the liege subjects &c., during all the time aforesaid, could not, nor can they now, pass and repass and navigate with their vessels, boats, lighters, barges, and craft in and along the said river and common king's highway, as freely as they before used and were accustomed to do, and still of right ought to do. To the great damage and common nuisance of all the liege subjects &c. in and along the said river and common king's highway there passing and repassing and navigating with their vessels, &c., as aforesaid; to the evil example &c., and against the peace &c.

2d Count. That *G. H. W.* afterwards, to wit, on &c., at &c., unlawfully, &c., did raise, erect, and place, and cause to be raised, &c., a certain embankment composed of gravel, earth, &c., and other materials, in and upon the soil and bed of the said river, called the river *Medina* or *Newport* river, and common king's highway there, in the stream and waterway of the same, of great length, height, and width, to wit, &c., projecting into, and athwart and across the stream and waterway of the same navigable river and king's common highway; and the said embankment so as aforesaid erected, raised, and placed, from &c. until &c., to wit, at &c., he, the said *G. H. W.*, unlawfully, &c., did continue, and still does continue, to the great damage &c.

3d Count.

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3d Count. That *G. H. W.* afterwards, to wit, &c., and on divers other days &c., with force &c., at *Cowes Harbour*, within the borough aforesaid, unlawfully, designedly, and injuriously did place and drive, and cause to be &c., divers, to wit, fifty posts to and into the bed and soil of the said navigable river and common king's highway, and did cast and throw, and cause to be &c., divers large quantities of stone, gravel, &c., into and upon the bed, stream, course, and waterway of the said river and common king's highway there, to wit, 200 vessel loads, &c., thereby forming a certain other great mound, slipway, and embankment, projecting and extending into the bed, stream, and waterway of the said river and common king's highway there, to a great length, height, and width, to wit, the length &c., into the same river and common king's highway, to wit, at *Cowes Harbour*, &c., whereby and by means whereof, the bed, stream, course, and waterway of the said river and common king's highway there, was during all the time aforesaid, and still is, greatly obstructed, impeded, straitened, and narrowed, and rendered less safe and commodious to the liege subjects &c., in and upon the said river and common king's highway there passing repassing and navigating with their vessels, &c., than the same otherwise would have been, and of right ought to have been and to be, to wit, at &c., to the great damage &c.

4th Count. That the said *G. H. W.*, to wit, on &c., and on divers other days &c., with force &c., at the borough aforesaid, unlawfully, &c., did cast and throw, and cause and procure to be &c., divers large quantities of earth, &c., into the said river and common king's highway there, to wit, 200 cart loads, &c., whereby and by means whereof the said river and common king's highway there was during all the time aforesaid, and still is, greatly obstructed, &c. (conclusion as in the preceding count).

5th Count. That the said *G. H. W.*, on &c., and from thence continually until &c., with force &c., at *Cowes Harbour* within the borough aforesaid, in, upon, and across a certain navigable river and common king's highway, called the *Medina* river, there situate, divers, to wit, ten other walls, ten other banks, 100 other posts, 500 pieces of timber, ten other slipways, ten other wharfs, and ten other embankments, before then unlawfully, wrongfully, and injuriously erected, built, and set up, in, upon, and across the said last mentioned navigable river and common king's highway, unlawfully, &c., did keep and continue, and still doth keep and continue, by means whereof the said last mentioned navigable river and common king's highway is greatly obstructed, straitened, and narrowed, to wit, at the borough aforesaid, to the great damage &c.

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Tuesday, January 12th.

DOE on the several Demises of The Governor and Company of The Bank of ENGLAND, and GREGORY, *against* CHAMBERS and Others.

Ejectment being brought on two demises, and a verdict being taken for the plaintiff on one, and for the defendant on the other, and leave being reserved to the plaintiff to move to enter a verdict for him on the second demise, he is not precluded from doing so by his having obtained early execution on the verdict on the first demise, and possession having been taken under it.

To an indenture of feoffment by the Bank of *England*, the seal of the Bank was affixed by a paper wafered to the indenture, on which paper was written, "Sealed by order of the Court of Directors of The Governor and Company of the Bank of *England*, 12th *December* 1833. *J. K.* secretary;" Held, that *J. K.* was not an attesting witness, and that the execution of the feoffment might be proved by the seal, without calling *J. K.*

Quære, Whether, when there is an attesting witness to the affixing of the seal of a corporation, such witness must be called to prove the deed?

EJECTMENT for lands in *Dorsetshire*. On the trial before *Patteson* J. at the *Dorsetshire* Spring assizes, 1835, the plaintiff proved, in support of the count on the first demise, a mortgage from the owner of the property to the Governor and Company of the Bank of *England*. In support of the count on the second demise, an indenture of feoffment, with livery of seisin, from the Governor and Company of the Bank of *England* to *Gregory*, was tendered in evidence. This instrument was sealed; and it was proved that the seal was that of the Bank of *England*. The seal was affixed by a piece of paper wafered to the parchment of the indenture; on the paper was written, — "Sealed by order of the Court of Directors of the Governor and Company of the Bank of *England*, 12th *December*, 1833. *John Knight*, secretary." The defendants' counsel contended that *Knight* was an attesting witness, and ought to be called. The learned Judge directed a verdict for the plaintiff on the first count (on the first demise) only, and for the defendants on the second count; reserving leave to move to enter a verdict for the plaintiff on the second. The plaintiff's counsel then

obtained

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obtained leave to issue early execution on the first demise; and possession was shortly after taken accordingly. In *Easter* term last, Sir *W. W. Follett* obtained a rule to enter a verdict pursuant to the leave reserved.

Erle now shewed cause. The plaintiff having taken out execution on the first count, on the demise of the Bank of *England*, cannot now insist on the second demise. The Bank of *England* and *Gregory* could not both be entitled to hold the term in severalty. [Lord *Denman* C. J. As leave was reserved to move to enter a verdict on the second count, we think that early execution on the first count does not form an objection to the rule.] The feoffment was not properly proved. The seal might have been sufficient of itself; but *Knight*, having added his name to verify the sealing, has made himself an attesting witness; and the execution cannot be proved without his being called. Every one is an attesting witness who is referred to in the instrument as a person cognisant of the execution. [*Littledale* J. Suppose an instrument executed under a power of attorney; must the attorney who executes be called?] That is the case of the person who executes, not of a person whose name appears as attesting the fact of execution by another.

Sir *W. W. Follett* contrà. The execution of a deed by a corporation is proved by shewing that the seal on the deed is the seal of the corporation, not by giving evidence of its being affixed by them. It may, therefore, be contended that, even if *Knight* did add his name in the character of an attesting witness, he need not have been called. But in fact his name was not inserted

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serted in that character. He does not attest the affixing of the seal by another party, as, for instance, by the secretary, or by a director. [Lord *Denman* C. J. Is there any inconsistency in the supposition that a man attests his own signature? Suppose a man signed as attorney, and attested such signature.] That would not be an attestation, properly speaking. If *A.* authorise *B.* to sign for him, and *B.* accordingly sign *A.*'s name, and recite that he has power so to sign, this cannot be called an attestation: indeed the signature by *B.* to a deed containing such a recital may itself be attested by a third person. Besides, in the present case, the paper signed is no more than a memorandum, as between the corporation and its own officers, of the person who can certify under what authority the seal was affixed. If *Knight* had been called, he could have proved only that he himself affixed the seal.

Lord DENMAN C. J. (after reading the words in question). Supposing this were a distinct attestation, I am not prepared to say that it would not be necessary to call the witness, although his attestation was unnecessary. But, in the present case, we cannot assume that what is called an attestation is more than a memorandum that the act was done by the order of the Governor and Company of the Bank of *England*. Probably it was no more. We cannot, therefore, treat it as an attestation.

LITTLEDALE J. When a corporation affixes its seal, it cannot, of course, do so by its own hands. This memorandum merely imports that the party signing it is the person who is deputed by the corporation to affix

affix its seal, and who accordingly does so by that authority.

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WILLIAMS J. The short description given on the piece of paper is all that is relied on, to lead to the conclusion that *Knight* is an attesting witness. It is thence assumed that the case is like that of the attestation of a bond, and that the witness must therefore be called. But the facts do not authorise that assumption; I rather infer that *John Knight* himself impressed the seal by order of the corporation, and not that he signed in the character of an attesting witness (*a*).

Rule absolute (*b*).

(*a*) *Coleridge* J. was absent.

(*b*) See the judgment of *Lawrence* J. in *Moises* v. *Thornton*, 8 *T. R.* 307. 1 *Phill. Ev.* p. 366. Part ii. ch. 5. 6th ed.

SPENCER *against* HAMERTON.

Tuesday, January 12th.

DECLARATION, *November* 1833, for libel. Pleas, the general issue; and twelve pleas of justification. Verdict for the defendant on the general issue, and for the plaintiff on the special pleas, no evidence being offered upon them by the Defendant. The Master allowed to the defendant the general costs of the cause, 95*l.* 9*s.* 4*d.*, and to the plaintiff the costs on the special pleas, 67*l.* 19*s.* 4*d.*, including, not only the costs of the pleadings, but those also of evidence prepared to answer the pleas of justification. In *Trinity* term 1835, a rule nisi was obtained on behalf of the defendant for review-

Where several pleas were pleaded under stat. 4 *Ann.* c. 16. and one party obtained a verdict on some of the issues, entitling him to the general costs of the cause, he was liable to pay the opposite party on the issues found for him, not only his costs of the pleadings, but his costs of preparing evidence on those issues. There was no difference in this respect between replevin and other actions. And the law was not altered by the General Rule *Hil.* 2 *W.* 4. I. 74.

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ing the taxation of costs on both sides. In the same term (*a*),

Tomlinson shewed cause. The stat. 4 *Ann. c.* 16., which allows the defendant or tenant in any action or suit, or any plaintiff in replevin, to plead several matters with leave of the Court, provides (sect. 5.) that, if a verdict be found upon any issue in the said cause for the plaintiff or demandant, costs shall be given "at the discretion of the Court," unless the Judge who tried the issue shall certify that there was probable cause for the plea. The practice under this statute has been to allow costs, not only of pleadings, but of witnesses, and the rule *Hil.* 2 *W.* 4. I. 74. (*b*) introduces no alteration. *Hart* v. *Cutbush* (*c*), and *The Duke of Newcastle* v. *Green* (*d*), cited in that case, are direct authorities for the practice (*e*).

Starkie, contrà. The plaintiff should have had costs of the pleadings only. The question turns on the construction of the statute. In *Othir* v. *Calvert* (*g*) it was held by the Court of Common Pleas, under the statute, that, "where a plea which goes to the whole of the cause of action is found for the defendant, the costs of the cause go to the defendant, and the costs of the issues found for the plaintiff go to the plaintiff; but that by the

(*a*) *June* 17th. Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Williams* Js.

(*b*) 3 *B.* & *Ad.* 385.

(*c*) 2 *Dowl. P. C.* 456.

(*d*) 2 *Dowl. P. C.* 459.

(*e*) *Tomlinson* further contended that the taxation was unjust to the plaintiff in respect of the allowance of costs of certain witnesses who attended the assizes for the defendant; but nothing was decided as to this.

(*g*) 1 *Bing.* 275.

costs

costs of the issues, was meant the costs of pleadings only." *Hart* v. *Cutbush* (*a*), was decided principally on the authority of *The Duke of Newcastle* v. *Green* (*b*), a case which never came to a final determination in court, but was compromised before a judge at chambers. As it is argued on the other side, if a plaintiff fails on the general issue, and the special pleas are not gone into, he is entitled to all his costs on the special pleas, if the judge does not certify, which the judge could not do unless the issues on the special pleas were to be tried for the purpose of ascertaining whether or not there was probable cause for pleading them. And great inconvenience would arise if parties always claimed to have this done. [*Patteson* J. The practice of allowing costs of the pleadings only appears to me contrary to the statute. I have never been able to discover the reason for so limiting the construction, nor do I understand the justice of it. *Littledale* J. The statute of *Gloucester* (*c*) gives only the costs of the "writ purchased;" yet that is extended to costs in general.]

Lord DENMAN C. J. The point was very fully considered in *Hart* v. *Cutbush* (*a*); but, as there is contrary authority, we had better see the other judges upon it before we decide.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. After stating the object of the rule, and the facts, his Lordship said:—It was contended for the defendant, that the proper course under the statute 4 *Ann.* c. 16. *sects.* 4 & 5. was to allow the plaintiff the

(*a*) 2 *Dowl. P. C.* 456. (*b*) 2 *Dowl. P. C.* 459.
(*c*) 6 *Edw.* 1. *c.* 1. *s.* 2.

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costs of the pleadings only, and that the rule of *Hil.* 2 *W.* 4. I. 74. had made no difference; and the case of *Othir* v. *Calvert* (*a*), was particularly relied on. For the plaintiff it was contended that the practice which had prevailed in conformity with the case of *Othir* v. *Calvert* (*a*), was wrong in principle, and had been so held by *Parke* J., in the case of *Hart* v. *Cutbush* (*b*). The 4th section of the statute of *Anne* permits any defendant or tenant in any action, or any plaintiff in replevin, by leave of the Court, to plead several matters; and the 5th section provides that, "if any such matter shall upon a demurrer joined be judged insufficient, costs shall be given at the discretion of the Court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall be also given in like manner, unless the Judge, who tried the said issue, shall certify, that the said defendant, or tenant, or plaintiff in replevin, had a probable cause to plead such matter which upon the said issue shall be found against him." The words "at the discretion of the Court" have been held not to give the Court power to refuse the costs, but only to tax them: *Duberley* v. *Page* (*c*), and many other cases. And an avowant in replevin is a defendant within the meaning of the fourth section; *Stone* v. *Forsyth* (*d*). The words of the statute of *Anne* are general and without limitation, not pointing to any distinction between costs of the pleadings and costs of the trial; and reason and common sense dictate that, if the defendant has put the plaintiff to unnecessary expense, by pleading that which turns out, either in law or in fact, to be unfounded, he should pay the plaintiff that expense,

(*a*) 1 *Bing.* 275.
(*b*) 2 *Dowl. P. C.* 456.
(*c*) 2 *T. R.* 391.
(*d*) 2 *Doug.* 709. *note* [2].

although

although he may be successful upon the general question. Yet it appears that a practice soon prevailed of limiting the costs to those of the pleadings only. That practice was condemned in the cases of *Brooke* v. *Willet* (*a*) and *Vollum* v. *Simpson* (*b*). It is true that both those cases were actions of replevin, in which the defendant is an actor, which was pointed out by one of the prothonotaries in *Othir* v. *Calvert* (*c*), and was supposed to make a difference. That supposition we think to be wholly erroneous; for the question turns upon the words of the statute of *Anne*, and upon the ordinary principles of justice, all of which are equally applicable to replevin and to other actions. So far, therefore, as the decision in *Othir* v. *Calvert* (*c*) depends on this distinction, we think that it cannot be supported.

But in the judgment of the Court it is said that the point was expressly ruled in *Benett* v. *Coster* (*d*), which was decided on the authority of *Vivian* v. *Blake* (*e*). Now neither of those cases touches the point in question. In *Vivian* v. *Blake* (*e*), which was in trespass, the defendant pleaded the general issue, and a justification which covered the whole trespass. The plaintiff had a verdict on the general issue, and the defendant on the justification; and the Court held that the plaintiff was not entitled to *any* costs; so that the present point could not arise. In *Benett* v. *Coster* (*d*) the questions were, who should have the general costs of the cause, and whether the defendant should have *any* costs: but the present question did not arise; at least it is not alluded to in the

(*a*) 2 *H. Bl.* 435.
(*b*) 2 *B. & P.* 368.
(*c*) 1 *Bing.* 275.
(*d*) 1 *B. & B.* 465.
(*e*) 11 *East*, 263.

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report; though doubtless it must have arisen in the prothonotaries' office: and, whichever way it was there determined, it does not appear to have been afterwards disputed.

Hart v. *Cutbush* (*a*) is an authority the other way, and, as we think, rightly decided; and though we had been led to suppose that the case of the *Duke of Newcastle* v. *Green* (*b*), which is there referred to by *Parke* J., but which is not reported, had been compromised and not decided, we have been informed by the learned Judge himself that it was decided in the manner stated by him; and the only compromise was as to the mode of settling the accounts between the parties, which was arranged before him at chambers.

It has been objected that the consequence of holding that decision to be right will be, that issues, which have become immaterial by the decision of some one, will always be tried out for the mere sake of costs, and that great waste of time and inconvenience and delay to other suitors will be occasioned. We do not think these consequences at all necessary; but, even if they were, they are not sufficient to prevent the statute of *Anne* from having that construction which appears most consonant to the intention of the legislature and to reason and justice. On these grounds we think that the Master's taxation of the plaintiff's costs is right.

A question was raised in the course of the argument, as to the allowance to the defendant of the costs of certain witnesses who were not called, as to which some doubt may be entertained; but this point was not

(*a*) 2 *Dow. P. C.* 456. (*b*) 2 *Dowl. P. C.* 459.

pressed

pressed by the plaintiff; and, as our decision is with him on the main question, it need not be discussed. The Rule must be discharged without costs (*a*).

(*a*) See *Reg. Gen. Hil.* 4 *W.* 4. *General Rules and Regulations*, 7. 5 *B.* & *Ad.* iv.

STOCKDALE *against* CHAPMAN.

Monday, January 18th.

TRESPASS for false imprisonment. Pleas, leave and licence; and four other pleas, claiming a right to detain the plaintiff till certain payments were made.

The plaintiff, to the first plea, replied de injuriâ, and concluded to the country. There was no "&c." added to this conclusion; and there was no similiter. The other pleas were regularly replied to, and issues regularly joined on the replications. On the trial before Lord *Denman* C. J., at the *Middlesex* sittings in *December* last, a verdict was found for the plaintiff.

To an action of trespass for false imprisonment, defendant pleaded leave and licence; to which the plaintiff replied de injuriâ, concluding to the country, without an "&c.;" and no issue was joined on this. There were also pleas of justification, under claims to detain the plaintiff till he made certain payments, which pleas were replied to, and issues joined on the replication: Held, that the defendant could not take advantage of the informality, after trial and verdict for the plaintiff.

Andrews Serjt. now moved for a rule to shew cause why there should not be a new trial; and he stated, as one ground for his motion, that there had been a mistrial, for want of issue being joined on the plea of leave and licence. The cases on this point are contradictory. In *Cooke* v. *Burke* (*a*), where one of three pleas, a plea of payment and satisfaction, had not been replied to, but the defendant added a similiter to all three, and the plaintiff obtained a general verdict, the Court of

(*a*) 5 *Taunt.* 164. The third plea was *nil debet*; and *Mansfield* C. J. said that the substance of the second plea must have been tried on the issue upon the *nil debet*.

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Common Pleas permitted the plaintiff to amend, by adding a traverse to the second plea. But in a later case, *Griffith* v. *Crockford* (*a*), the Court of Common Pleas set aside a verdict for want of a similiter. In a still later case, *Swain* v. *Lewis* (*b*), *Parke* B. discharged a rule for setting aside a verdict for want of a similiter to a traverse in the plea, on the ground that "&c." was added at the end of the plea, which might, after verdict, be considered to include the similiter.

The Court (*c*) refused the rule on this point, referring to note (6) on *Bennet* v. *Holbech* (*d*). A rule nisi was granted on another ground.

(*a*) 3 *B.* & *B.* 1. (*b*) 3 *Dowl. P. C.* 700.

(*c*) Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* Js.

(*d*) 2 *Wms. Saund.* 319. *a.* See 2 *Chitty's Archbold*, 3d ed. pp. 984, 985. *Vivian* v. *Jenkin*, 3 *A.* & *E.* 741, 750.

Tuesday, January 14th.

DE VAUX *against* SALVADOR.

Insurance on a ship, *V.*, with the usual warranty as to average. The ship having come into collision with another ship, and proceedings being instituted for the damage done to the other ship, the matter was referred to arbitrators, who awarded that each ship should bear half of the aggregate loss. The ship *V.* on the settlement had to pay a balance to the other ship: Held, not to be a loss to which the underwriters were liable.

Held, also, that the expense of the wages and provisions of the crew of the *V.*, during the time that she was detained in repairing damage done to herself by perils of the sea, were not such a loss.

ASSUMPSIT on a policy of insurance for time on the ship *La Valeur*. The declaration claimed for general average, and for an average loss; the damage was laid to have been occasioned by perils of the sea. The policy contained the usual warranty, free from average under three pounds *per cent.*, unless general, or the ship be stranded. The defendant, as to the claim of particular average, pleaded that the ship did

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not sustain an average loss or damage to the amount of 3 per cent., on which plea issue was joined. On the trial before Lord *Denman* C. J. at the *London* sittings after last term, it appeared that the *La Valeur*, being in in the *Hoogly* river, during the time covered by the policy, came into collision with a steam vessel called the *Forbes*, and that considerable damage was done to each vessel. The owner of the *Forbes* claimed a compensation from the *La Valeur*, and threatened to detain her, and to proceed in the Court of Admiralty at *Calcutta;* and, upon the claim being referred to arbitration, it was awarded that each ship should bear half the joint expenses of the two. Upon the settlement, the *La Valeur* had to pay a balance to the *Forbes*. The *La Valeur* was detained by the necessity of repairing certain damage done to herself by perils of sea; and, during the time of detention, a sum of money was expended in the additional wages of the crew and provisions for them. If either this sum of money or the balance paid to the *Forbes* could be considered a particular average, then there was on the whole an average loss of 3 per cent., but not otherwise. The Lord Chief Justice was of opinion that neither of these items could be taken into the account of particular average; and a verdict was found for the defendant on the above issue.

Maule now (*a*) moved for a rule to shew cause why a verdict should not be entered for the plaintiff for such sum as the Court should direct, or why a new trial should not be had. It is clear that the aggregate

(*a*) Before Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* Js.

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of several partial losses may make up the 3*l.* per cent.; *Blackett* v. *The Royal Exchange Company* (*a*). Here the 3*l.* per cent. will be made up if either of two items be allowed. First, the underwriters are liable for the sum paid to the *Forbes*. The words in the policy are, "all other perils, losses, and misfortunes that have or shall come, to the hurt, detriment, or damage of the said goods and merchandizes and ship, &c., or any part thereof." There is, indeed, no *English* decision precisely on the point; but there seems to be as good reason for underwriters making good such loss as a loss sustained from pirates. [*Littledale* J. That loss is particularized.] But it would clearly be the subject of indemnity, though not particularized. A general average comes within the insurance only from the general words. The expression "free of average, under three pounds per cent., unless general," shew this; for general average is specified as an exception from the exception: it must therefore be included in the subject matter from which the main exception is made, that is, in the perils insured against. But among these perils there is no specific mention of general average: the general words therefore cover that, and the same words must also be sufficient to cover any loss by an accident like that in question. The principle is, that the underwriter makes good all that, by means of the peril, the owner is bound to pay: and here he was, in fact, as much bound to pay as the owner of goods is bound to pay harbour duties; for the owners of the *Forbes* had the legal means of enforcing the payment. It is true that, by the *English* common law, each party bears

(*a*) 2 *Cr.* & *J.* 244. *S. C.* 2 *Tyrwh.* 266.

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his own costs, in case of a collision, if there be fault in each; and it must certainly be assumed that there was fault on each side, in the present case. But the more generally understood law in maritime states is that, if there be fault in each party, each bears half of the aggregate loss of the two; and this may perhaps be considered the more reasonable principle. In the case of *The Woodrop-Sims* (*a*) this rule was laid down by Sir *William Scott*, as follows: — "This is one of those unfortunate cases in which the entire loss of a ship and cargo has been occasioned by two vessels running foul of each other. There are four possibilities under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm, or any other *vis major*: In that case, the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. — Secondly, a misfortune of this kind may arise where both parties are to blame; where there has been a want of due diligence or of skill on both sides: In such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. — Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burthen. — Lastly, it may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other." In the *Laws of Oleron* (*b*)

(*a*) 2 *Dods. Adm. Rep.* 85.

(*b*) 15 *Vin. Abr.* tit. *Master of a Ship*, (A) 27. p. 340.

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it is said, "If a ship in her voyage, lying any where at anchor, be struck or grappled with another vessel under sail, for want of good steering, whereby the vessel at anchor is prejudiced, and the goods in her damnified; in such a case the whole damage is to be in common, and to be equally divided and appraised half by half. And the master and mariners of the vessel that struck, or grappled with the other, shall swear on the Holy Evangelists, that they did it not wittingly or wilfully; the reason of this judgment is, that an old vessel might not purposely come in the way of a better; which she will hardly do, as long as the damage must be equally shared." In *Emerigon*, vol. i. p. 413. (ed. 1827 (*a*)), it is said, "Si l'abordage n'est pas arrivé par cas fortuit, et qu'il soit impossible de savoir par la faute de qui, c'est alors le cas de partager le différend, et de faire supporter la moitié du dommage à chacun des deux navires. Tel est le sens de l'art. 10, *titre des avaries*. 'En cas d'abordage de vaisseaux, est-il dit, le dommage sera payé également par les navires qui l'auront fait et souffert, soit en route, rade, ou au port.'" For which are cited *Les Jugemens d'Oléron*, art. 14.; *L'Ordonnance de Wisbuy*, art. 26, 27, 50 & 70.; and *Le Droit Anséatique*, tit. 10. The editor, M. *Boulay-Paty*, in the comparison, at the end of the section, with the modern code of commerce, says (p. 417.) that the law is that, if there be doubt, in the case of collision, as to the cause, each vessel is to bear its part; and he goes on thus: "La loi considère donc comme les vraies causes du dommage la fortune de mer, la force majeure qui a poussé les navires l'un sur l'autre; et dans ce cas, la portion qui

(*a*) Ch. xii. s. 14.

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incombe au navire assuré doit être à la charge des assureurs, qui, par la nature du contrat d'assurance, sont tenus de tous les accidens arrivés sur mer, quelque insolites, inconnus ou extraordinaires qu'ils soient." (*a*) That reasoning applies here; and it may be added that, the less an accident can be foreseen, the more properly is it the subject of insurance, since that which was foreseen would not be insurable. *Pothier*, in his *Traité du Contrat d'Assurance*, ch. i. sect. ii. art. 2. § 2. 49. (*b*), says, "L'assureur se charge par le contrat d'assurance, des risques de tous les cas fortuits qui peuvent survenir par force majeure durant le voyage, et causer à l'assuré une perte dans les choses assurées, ou par rapport auxdites choses." If, then, the *La Valeur*, as was clearly the case, could not be released without this payment, the payment falls within that class of losses which the underwriters must make good.

Secondly, as to the wages and provisions of the crew for the time during which the ship was under necessary repair. These are incidental to the repairs, and, being so, must be governed by the same rule. It is a general principle (subject to some exceptions which may easily be explained,) that, where underwiters are liable to indemnify for any part of a loss, they must indemnify for the whole. Now, in the case of any damage which is the subject of general contribution, the wages and other expenses of the crew during the time of repair, which are in the nature of accessaries to the principal expense, that of repairing, must also be the subject

(*a*) And see *Boulay-Paty, Cours de Droit Commercial Maritime*, tit. X. s. 16. tom. 4. p. 16.

(*b*) *Traités sur Différentes Matieres de Droit Civil*, tom. 3me. p. 18. (2d ed. 1781).

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of general contribution. In *Abbott on Shipping*, Part III. ch. 8. s. 7. p. 350. (5th ed.), it is said, "But if a ship should necessarily go into an intermediate port for the purpose only of repairing such a damage as is in itself a proper object of general contribution, possibly the wages, &c. during the period of such a detention, may also be held to be general average, on the ground that the accessary should follow the nature of its principal." The author does not apply this to insurances, which are not the subject of his work; but the passage seems to warrant such an application of the doctrine, that the accessary is to follow its principal. Now, here, the underwriters were indisputably bound to make good the expense of the repairs: they must, therefore, bear the accessary expense. Suppose, in the case put in the extract just given, the owner of goods, who was liable to the general average, had insured these goods, the underwriters would have to make good the payment of the wages, &c. Why should the same principle not be applied, where the insurance is on the ship, to the share of general average which falls on the owner of the ship? And, if there be no cargo, and consequently no one to contribute to a general average, can that make any difference in the liability of the underwriters? Can it be contended that the principle holds if there be a single bale of goods on board, but ceases to be applicable if there be no cargo? When the damage is to the subject insured, that is a partial loss, to which the underwriter is liable; and it is immaterial to inquire whether it be a general average or not, the underwriter being liable to the assured in the whole (though, if it be a general average, he may claim contribution from those liable

liable to contribute); so that, in such a case, as between the underwriter and the assured, particular and general average become identical. In *Fletcher* v. *Poole* (*a*) it was held that the extraordinary wages and provisions expended during the detention of the ship could not be recovered on a policy on the ship. But that was a mere case of detention to refit: the plaintiff claimed only the wages and provisions expended during her repairs. It does not appear that the repairs were occasioned by any thing but ordinary wear and tear, or by any thing for which the underwriters were liable. The same remark applies to the cases of *Eden* v. *Poole* (*b*) and *Robertson* v. *Ewer* (*c*). In *Power* v. *Whitmore* (*d*) the wages and provisions of the crew expended while the ship was in port repairing a damage occasioned by a tempest were held not to be the subject of general average; and, consequently, the plaintiff, whose insurance was on goods, could not recover against his underwriter money paid by him as a contribution to such expenses. That decision was on the ground that there had been no sacrifice of a part to preserve the whole, and consequently no general average to which the plaintiff was liable to contribute; reasoning which does not shew that the underwriter on the ship would not be liable to pay the expenses in question, but rather that he would be; for there is no doubt that the principal damage to which the expenses in question were accessary, being a damage to the ship by the perils of the sea, would be one to which he would be liable, though the underwriter on goods (the defendant in

(*a*) 1 *Park, Ins.* ch. 2. p. 89. 7th ed.
(*b*) 1 *Park, Ins.* ch. 2. p. 91. 7th ed.
(*c*) 1 *T. R.* 127. (*d*) 4 *M. & S.* 141.

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Power v. *Whitmore* (*a*)) would not, according to the doctrine, laid down in *Abbott on Shipping*, Part III. ch. 8. s. 7. p. 350. (5th edit.), that such expenses are not matter of general average, but "must fall on the ship alone." Whoever is liable to the damage sustained by the ship must therefore sustain such expenses. It follows that the underwriter on the ship, who is clearly liable to the damage which the ship sustains, must pay these expenses also. A stater of averages arranges the losses in three columns, headed respectively, "General," "Ship," "Owners;" and under "Ship" he sets down all to which the underwriters on the ship are liable. So *Buller* J., in *Eden* v. *Poole* (*b*), held the underwriters on the ship and goods not liable, because "the freight, and not the ship," was liable to the loss. In the last cited passage in *Abbott*, the author refers to the *Code de Commerce*, art. 403. (*c*). There the expenses of the wages and provisions of the crew, during the detention by a foreign power, or by the necessity for repairs, are classed together as particular averages; and the article is cited in the conference of the modern law with *Emerigon* (vol. i. p. 619. ch. xii. s. 41. ed. 1827), by *Boulay-Paty*. The same author, in a work of his own, *Cours de Droit Commercial Maritime*, vol. iv. p. 40. tit.

(*a*) 4 *M. & S.* 141. (*b*) *Park, Ins.* ch. 2. p. 91. 7th ed.

(*c*) Tit. 11ème, "Sont avaries particulières: — 1° le dommage arrivé aux marchandises par leur vice propre, par la tempête, prise, naufrage ou échouement; — 2° les frais faits pour les sauver; — 3° la perte des câbles, ancres, voiles, mâts, cordages, causée par tempête ou autre accident de mer; — les dépenses résultant de toutes relâches occasionnées, soit par la perte fortuite de ces objets, soit par le besoin d'avitaillement, soit par voie d'eau à réparer; — 4° la nourriture et le loyer des matelots pendant la détention, quand le navire est arrêté en voyage par ordre d'une puissance, et pendant les réparations qu'on est obligé d'y faire, si le navire est affrété au voyage."

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X. s. 16., says that, in case of the arrest or other detention of a vessel after departure (and in the passage just cited, arrest "par ordre d'une puissance" is placed in the same class with detention for the purposes of repair), the insurers must bear the loss resulting from the cost of provisions and wages of the crew. This is also the *American* law (*a*). Some foreign authorities class such expenses as general average, on the same principle as that upon which expenses of going into port to preserve a ship are so classed: this is apparently an extension of the *Rhodian* law, by which a *jactus* was requisite (*b*).

Cur. adv. vult.

Lord DENMAN C. J. in this term (*January* 30th) delivered the judgment of the Court.

This was a motion for a new trial in an action of assumpsit, tried before me at *Guildhall*, on the insurance of a ship, for loss by perils of the sea. The jury found a verdict according to my direction, excluding the expense for wages and provisions incurred from the time of her repairing damage sustained from a storm, and excluding also the sum of money which the owners had paid in consequence of some proceedings commenced in the Court of Admiralty at *Calcutta*, in consequence of an accidental collision with another vessel in the *Hoogly* river. The new trial was moved for on the ground that both these heads of damage ought to have been taken into account by the jury.

(*a*) See, however, *Phillips's Treatise on the Law of Insurance*, vol. i. ch. xvi. sec. 1. p. 370. (Boston, U. S. 1823).

(*b*) See *Pardessus, Cours de Droit Commercial*, tom. 2. part iv. tit. iv. ch. iv. sect. i. § v. (740), and part iv. tit. v. ch. i. sect. ii. § i. (773).

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We think it clear, on authority, that the former item ought not to be allowed. As long ago as 1769, in *Fletcher* v. *Poole* (*a*), the point was decided by Lord *Mansfield* at Nisi Prius. The doctrine has been cited in the text-books ever since that period, and is expressly recognised by *Buller* J. in *Robertson* v. *Ewer* (*b*). The facts of that case did not indeed require the doctrine, which is merely assumed in the argument of that learned Judge to illustrate his opinion on the case then before the Court. Mr. *Maule* therefore urged that the law rested on a single decision of Lord *Mansfield*'s at Nisi Prius; but, when we consider the high authority of that great master of insurance law, — that that case was unquestioned, — that it received the sanction of so eminent a lawyer as Mr. Justice *Buller*, who treats it as clear enough to lay the foundation of an argument from analogy; — when it is fully adopted in the works of distinguished writers on the subject; — and, above all, when we find no trace of even a claim being set up inconsistent with it for a period of near 70 years, though the facts must have afforded the opportunity many thousands of times, we think this point must be regarded as fully established, and that we should not be justified in casting any doubt upon it.

We would only further observe that the passage cited from Lord *Tenterden*'s excellent work (*c*), which speaks of these expenses as being in the nature of an accessary to a principal, is confined to the questions of contribution which may exist between the owners and the freighters, and does not in anywise relate to the de-

(*a*) 1 *Park, Ins.* ch. ii. p. 89. 7th ed. (*b*) 1 *T. R.* 132.
(*c*) *Abbott on Shipping*, 350.

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mands which may be preferred against underwriters. It therefore furnishes no proof that he differed from the doctrine above alluded to. On the contrary, if he had intended to do so, he could hardly have failed to express his dissent in direct terms.

The second point appears to be entirely new, which circumstance is not so strong an argument against it as against the former claim, because the event is likely to have been of much less frequent occurrence. But, if we look for the principle on which *Fletcher* v. *Poole* (*a*) was decided, it must obviously be that well-known maxim of our law, *in jure non remota causa sed proxima spectatur*. "It were infinite" (says *Bacon* (*b*)) "for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any farther degree." Such must be understood to be the mutual intention of the parties to such contracts. Then how stands the fact? The ship insured is driven against another by stress of weather; the injury she thus sustains is admitted to be direct, and the insurers are liable for it. But the collision causes the ship insured to do some damage to the other vessel; and, whenever this effect is produced, both vessels being in fault, a positive rule of the Court of Admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. It turns out that the ship insured has done more damage than she has received, and is obliged to pay the owners of the

(*a*) 1 *Park, Ins.* ch. ii. p. 89. 7th ed.

(*b*) *Maxims of the Law*, p. 35. of *Law Tracts*, 1737.

other

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other ship to some amount, under the rule of the Court of Admiralty. But this is neither a necessary nor a proximate effect of the perils of the sea; it grows out of an arbitrary provision in the law of nations from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it; and can no more be charged on the underwriters than a penalty incurred by contravention of the revenue laws of any particular state, which was rendered inevitable by perils insured against.

We think therefore that no rule ought to be granted.

Rule refused.

RICKETTS *against* BODENHAM and Others.

Same *against* Same.

Same *against* Same.

THE defendants, being the churchwardens of the parish of *Presteign*, in the diocese of *Hereford*, for the year commencing at *Easter* 1830, instituted a suit on the 8th of *July* 1830, against the plaintiff, in the Consistory Court of *Hereford*, for three church rates, amounting severally to 5*l.* 15*s.*, 4*l.* 6*s.* 3*d.*, and 4*l.* 6*s.* 3*d.*, assessed by the churchwardens for the years 1827, 1828, and 1829 respectively. Before they had proceeded beyond the libel, they amended the libel, by abandoning their claim for all but the rate of 4*l.* 6*s.* 3*d.* made by the churchwardens for 1829. A decree was pronounced against the plaintiff, with costs. He then appealed to the Court of Arches, which affirmed the decree, with costs. He then appealed again to the Court of Delegates, which also affirmed the decree, with costs. Three significavits were issued from the several courts, for the sum of 4*l.* 6*s.* 3*d.* and costs, and three several writs de contumace capiendo.

In *Trinity* term last Sir *F. Pollock* obtained three

Stat. 53 G. 3. c. 127. s. 7., which gives power to a justice to enforce the payment of a sum under 10*l.* due upon a church-rate, where the validity of the rate has not been questioned, nor the liability of the party, takes away the jurisdiction of the Ecclesiastical Court in such cases.

But, if the validity or liability be in question, the Ecclesiastical Courts have jurisdiction, though the party has not been summoned before a justice.

Therefore, where a party, not having been summoned before a justice, was libelled in the Consistory Court for a sum which, on the face of the proceedings, was less than 10*l.*, due upon a church-rate, and sentence was given against him, this Court refused to grant a prohibition, upon the ground that the validity of the rate was questioned in the proceedings in the Ecclesiastical Courts.

And afterwards, it appearing, by more particular reference to the pleadings themselves, that they did not disclose whether or not the validity was questioned, this Court held that that circumstance alone did not authorise it to issue a prohibition.

Semble, that the Consistory Court of the Bishop, the Court of Arches, and the Court of Delegates, are superior courts; and that after sentence, unless defect of jurisdiction be apparent on the proceedings therein, it will not be intended.

Semble, that, on a motion for prohibition as above, this Court will look only to the proceedings in the Ecclesiastical Court, and not to affidavits, for the purpose of ascertaining whether the validity of the rate was there questioned.

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rules to shew cause why writs of prohibition should not issue to the three ecclesiastical courts respectively, on the ground that stat. 53 *G.* 3. *c.* 127. *s.* 7. (*a*) took away the jurisdiction of the spiritual courts in cases where the claim made is for a church rate under 10*l.* The affidavit in support of the rule stated the above facts, and that questions respecting the validity of the writs and significavits were pending before this Court and the Court of Chancery; and that the plaintiff believed the whole of the writs and significavits to be irregular, invalid, and illegal; that previously to the commencement of the suit he had not been summoned, nor, to his knowledge and belief, had any proceedings been taken against him, before any justice of the peace; and that previously to such commencement the validity of the rates had not, to his knowledge, been questioned in any ecclesiastical court. There were also statements for the purpose of shewing that the sentence of the Consistory Court was wrong on a point of practice.

By the affidavits in answer, it appeared that Mr. *Ricketts*, after the affirmation of the sentence by the Court of Delegates, presented a petition, and also a supplemental petition, to the King in Council, for a commission of review, which petitions were referred to the Lord Chancellor, and rejected; that, before the significavit from the Consistory Court of *Hereford* issued, as mentioned in the affidavit in support of the rule, a significavit had issued from the same court, which had been quashed for irregularity on motion before the Lord Chancellor, and that no writ de contumace capiendo had issued thereon; that motions were after-

(*a*) See the clause set out, antè, p. 356. note (*a*).

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wards made in Chancery to quash the three significavits mentioned in the affidavit in support of the rule; that the Court of Chancery had then quashed the significavit from the Consistory Court which had issued after the quashing of the previous one, but had sustained those from the other two; that, in the proceedings, Mr. *Ricketts* had questioned the validity of the rate; that, in the proceedings before the Court of Delegates, he had printed the whole of the rates of 1830 and 1832; and that, in his petition for the commission of review, he had insisted on the invalidity of the rate, on the following grounds, viz. that it contained on the face of it an unequal and fraudulent assessment, that it was made partly for an illegal purpose, that there was no proof in the cause that the rate was duly made, and with legal notice, as asserted in the libel; that the rate was not stated in the libel, though found in the sentence, to have been made at a meeting of the landholders; and that there was no proof that the inhabitants who attended were landholders. The affidavits further stated that Mr. *Ricketts* had never, during the proceedings, raised the question as to his not having been summoned before the justices; that the objections on the point of practice had formed the subject of the appeal; and that, before the suit commenced, Mr. *Ricketts* had, on being applied to for the rate, refused, alleging as his reason that the rate was illegal for stating a part of his land to be situate in a wrong township of the parish.

The case was argued in last *Michaelmas* term, *November* 24th (*a*) and 25th (*a*), and in this term, *January* 28th (*b*).

(*a*) Before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.
(*b*) Before Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* Js.

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Sir *John Campbell*, Attorney-General, shewed cause. Sentence having been pronounced in each of the three courts, no prohibition can issue; *In the matter of Poe* (*a*), in the case of a court martial; unless upon the face of the proceedings there be no jurisdiction; *Buggin* v. *Bennett* (*b*), in the case of the Court of Admiralty; *Blacquiere* v. *Hawkins* (*c*), in the case of the Lord Mayor's Court in *London*; *Full* v. *Hutchins* (*d*), in the case of an ecclesiastical court. Other authorities are collected in *Harrison's Digest*, *Inferior Courts*, iii. 2., and *Com. Dig.*, *Prohibition* (D). In *Gould* v. *Gapper* (*e*) it appeared, upon a declaration in prohibition, which was demurred to, that an ecclesiastical court had put a wrong construction on an act of parliament, and this Court (after sentence) directed that the prohibition should stand. There the nature of the question entertained by the ecclesiastical court, and the decision to which that court came, were collected from the proceedings as set forth in the declaration in prohibition and admitted by the demurrer. That case shews how the defendant here should have raised the question of the jurisdiction of the ecclesiastical court, so as to make the case cognisable by this Court after sentence. If, in this case, the plaintiff were to declare in prohibition, nothing would appear but the libel and sentence. Upon demurrer, as in *Gould* v. *Gapper* (*e*), to such a declaration, the defendant must have had judgment. Supposing the proceedings to be properly before the Court, the question is, whether they necessarily shew want of jurisdiction. It will be

(*a*) 5 *B.* & *Ad.* 681. (*b*) 4 *Burr.* 2035.
(*c*) 1 *Doug.* 378 (*d*) 2 *Comp.* 422.
(*e*) 5 *East*, 345.; and see *Gare* v. *Gapper*, 8 *East*, 472.

said

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said that stat. 53 *G.* 3. *c.* 127. *s.* 7., by giving to two justices of the peace power to enforce the rate in cases under 10*l.*, impliedly takes away the power of the ecclesiastical court in such cases; and that here the rate proceeded for appears on the proceedings to have been under 10*l.* The object of that provision was to prevent the necessity of summoning before an ecclesiastical tribunal parties who refused to pay small rates, but did not dispute their legal liability to do so, as Quakers. But, even admitting that the power of the ecclesiastical court is taken away by implication whereever power is given to the justices (though it might be argued that in such cases the jurisdictions are co-ordinate), still the statute gives the power to the justices only where the validity of the rate has not been questioned in any ecclesiastical court, and expressly saves the power of that court, where the validity of the rate, or the liability of the person, is questioned. It does not appear on the face of these proceedings that the validity or liability was not questioned; and the Court will presume in favour of the sentence whatever is necessary to give jurisdiction: the prohibition cannot go, unless the proceedings be necessarily on the face of them without jurisdiction, and this they are not if any state of facts consistent with them can be suggested which would give jurisdiction. Further, it appears by the affidavits that the plaintiff did in fact dispute the validity of the rate. [*Coleridge* J. How can we notice that fact upon affidavit?] If facts not on the face of the proceedings can be noticed, the Court will see that this prohibition could not have gone even before sentence, especially as it does not appear that the plaintiff, when before the ecclesiastical court, made the com-

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plaint now raised in his affidavit, that he had not been summoned before justices; and the appeals are the act of the plaintiff himself.

Sir *Frederick Pollock*, contrà. The amount proceeded for is less than 10*l.* The parties had no right to unite the by-gone rates with another, in order to carry the sum above 10*l.*; and all but the last rate, which is under 10*l.*, was abandoned. Therefore it is as if the last rate alone had been demanded at first. The stat. 53 *G.* 3. *c.* 127. *s.* 7. expressly preserves the jurisdiction of the ecclesiastical courts in causes touching the validity of the rate, and their power to enforce payment, where the amount exceeds 10*l.* This shews that the previous part of the section, by conferring the power upon two justices when the sum does not exceed 10*l.*, takes it away in such cases from the ecclesiastical courts. Besides, the mere fact that there is a remedy in the temporal courts is ground for a prohibition to the spiritual courts(*a*). It is said in *Co. Lit.* 96 *b.*, "And here is implied another maxim of the law, that where the common or statute law giveth remedy in *foro secularí*, (whether the matter be temporal or spiritual) the conusance of that cause belongeth to the king's temporal courts only; unless the jurisdiction of the ecclesiastical court be saved or allowed by the same statute to proceed according to the ecclesiastical laws." It is true that the ecclesiastical courts still retain the jurisdiction for any amount, where the validity of the rate, or the personal liability, is disputed; but that power is preserved merely by the enactment that the

(*a*) But see *Cranden* v. *Walden*, 3 *Lev.* 17.

justices

justices shall "forbear giving judgment," on receiving notice from the party, and that then the person demanding may proceed as before the act. This shews that the jurisdiction does not vest in the ecclesiastical courts, where the amount is less than 10*l.*, till the party has been summoned before the justices; for he otherwise has no opportunity of giving the notice. Now here the plaintiff never was so summoned; the proceedings in the ecclesiastical court are therefore merely void, and it is immaterial what the plaintiff did before a court which had no cognisance of the question. Then it is said that the application is too late. *In the matter of Poe* (*a*) is not an authority for the point contended for: there the sentence was executed before the application was made. If the matter appear to be out of the jurisdiction of the Court, the prohibition may go after sentence, and even, in some cases, after execution. The authorities are collected in *Com. Dig. Prohibition* (D). A cause cannot indeed be properly said to be fully over while the execution is in fieri; and, until all be done which the court below can do, the prohibition may issue. Here, as to the Consistory Court at all events, the significavits which they have issued turn out to be incorrect, and they may grant a fresh monition; *Austen* v. *Dugger* (*b*): the suit below is therefore still in fieri. It is said that the plaintiff has chosen to appeal; but, if he had not appealed, the only difference in the result would have been that he would have earlier been in the position in which he is now. By stat. 1 *W.* 4. *c.* 21. *s.* 1. application for prohibition may now be made upon affidavit only. Even admitting it to be necessary that

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(*a*) 5 *B.* & *Ad.* 681. (*b*) 1 *Add. Eccl. Rep.* 307.

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the defect of jurisdiction should appear on the proceedings, they show that the sum demanded was less than 10*l.* But the rule suggested on the other side as to this point is inaccurate. It is true that, in the case of superior courts, unless on the face of the record there be necessarily a want of jurisdiction, every thing essential to the jurisdiction shall be intended; but, in the case of inferior courts, all that is essential to the jurisdiction must appear on the face of the proceedings, otherwise the jurisdiction will not be presumed; 2 *Bacon's Abridgment*, *Courts*, D. 3. and 4.; 7th ed. So that the proceedings are bad, for want of shewing that the validity of the rate, or the liability of the party, was in question. [Sir *J. Campbell.* The authorities cited as to inferior courts do not apply to the spiritual courts, which are courts Christian and superior, though liable to prohibition if they exceed their jurisdiction. As to the argument that a new monition may issue, that, at any rate, does not apply to the Court of Arches, nor the Court of Delegates, the significavits of these two courts having been held good, and those courts having therefore no more to do.]

Cur. adv. vult.

Lord [DENMAN C. J., in this term (*February* 1st), delivered the judgment of the Court.

There were three cases of application for a prohibition in the same cause; the first to the Consistory Court of the diocese of *Hereford*, the second to the Court of Arches, the last to the Court of Delegates, in each of which courts successively sentence had passed against the applicant.

It appeared that the original suit had been to enforce the

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the payment of a church-rate amounting to 4*l.* 6*s.* 3*d.*, and that the defence had been that the rate was made at a meeting of which no due and legal notice had been given, that it was made for an illegal purpose, and shewed upon the face of it an unequal and fraudulent assessment.

On shewing cause against the motion, it was contended that the only ground of prohibition suggested was a supposed want of jurisdiction in the court below to proceed in the matter of a church-rate, where the sum to be recovered did not exceed 10*l.*, but that the objection, coming after sentence, was too late, unless it appeared on the face of the proceedings in that court. And there is no doubt that, in the case of prohibitions to be granted *for the sake of trial*, as distinguished from those which are to be granted upon account of a wrong trial or erroneous judgment, the rule is established, that a party neglecting to contest the jurisdiction in the first instance, and taking his chance of a favourable decree, shall not be allowed after sentence to allege the want of jurisdiction as a ground of prohibition, *unless the defect appears on the face of the pleadings.* The justice of the rule is very apparent, and the propriety of the exception scarcely less so; for it is the duty of this Court to restrain any encroachment of jurisdiction in the inferior courts, and therefore it interferes for the sake of the public, and not of the individual, where, the want of jurisdiction appearing on the face of the proceedings, the case might become a precedent, if allowed to stand without impeachment.

In support of the application, Sir *F. Pollock* scarcely disputed this general doctrine; but he contended that, inasmuch as, on the face of the libel, the suit appeared

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to be for a rate under 10*l.*, the want of jurisdiction was from that circumstance alone, and by itself, apparent. It is necessary therefore to examine the statute 53 *G.* 3. *c.* 127. *s.* 7. to see whether this argument is maintainable.

That section commences with a preamble, stating the expediency that church or chapel rates of limited amount, unduly refused or withheld, should in certain cases be more easily and speedily recovered. It then goes on to provide for the case of a refusal or neglect by any one duly rated to a church rate, or chapel rate, the validity of which has not been questioned in any ecclesiastical court, to pay the sum in which he is rated; and gives a summary mode of enforcement before two justices, who are empowered to order the payment of what is due and payable in respect of such rate, so as the sum ordered to be paid do not exceed 10*l.* There is then an appeal given to the sessions against such order, with a stay of execution pending the appeal. And this is followed by the material proviso, "that nothing herein contained shall extend to alter or interfere with the jurisdiction of the ecclesiastical courts to hear and determine causes touching the *validity of any* church rate or chapel rate, or from proceeding to *enforce the payment* of any such rate, *if the same shall exceed the sum of* 10*l.* from the party proceeded against." If the section had stopped here, we should have thought it clear that a distinction was made between suits in which the *validity* of a rate was questioned, and those in which, the rate being undisputed, the only object was to *enforce the payment;* that, as to the former, the jurisdiction of the ecclesiastical courts was left wholly untouched; in the latter, it was by implication taken away where

where the sum does not exceed 10*l.* This interpretation makes the enacting part of the section and the proviso consistent, and both together to form a complete enactment on the subject. But this view of the statute is made more clear by the proviso which immediately follows, that, "if the *validity* of such rate, or the *liability* of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon, and the person or persons demanding the same may then proceed to the recovery of their demand, according to due course of law, as heretofore used and accustomed." This proviso applies only to cases under 10*l.*; and the effect of it is that, even in such cases, the moment it appears that the question is one not merely of *enforcing payment*, but touching the *validity* of the rate, the summary jurisdiction is at an end, and that of the ecclesiastical court attaches.

If this interpretation of the section be correct, it is obvious that the *mere* fact, that on the face of the proceedings the suit appears to relate to an assessment for a sum not exceeding 10*l.*, cannot prove a want of jurisdiction in the ecclesiastical court to entertain the cause. Without entering into the argument at the bar, as to presumptions for or against the proceedings of inferior courts, or whether the doctrine applies to the ecclesiastical courts, it is at least undeniable that this Court ought to examine the whole of the proceedings, in order to collect from them, if it can, whether the suit, admitted to be for less than 10*l.*, was a suit in which the validity of the rate or the liability of the defendant was questioned, or whether it was merely for enforcing the payment;

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ment; this being the real point on which the question of jurisdiction must depend.

Now, upon such examination, it is obvious that the validity of the rate, and nothing else, was in question; it follows, therefore, that there is no want of jurisdiction apparent on the face of the proceedings: and it becomes unnecessary to give any opinion upon other points made in the argument.

Considering that Mr. *Ricketts* has proceeded through two stages of appeal without raising the ground of objection which is now made, we cannot regret that all the authorities warrant us in discharging this rule.

Rule discharged.

In *Easter* term following (*April* 18th) Sir *Frederick Pollock* again applied (*a*) for a rule to show cause why a prohibition should not issue, on an affidavit by the plaintiff that the validity of the rate had not been questioned in the ecclesiastical court, nor had the defendant then disputed his liability to pay; that he should not have questioned either, if he had been summoned before justices; and that he conceived the Court to have given judgment on the supposition that he had raised such a question before the ecclesiastical court. The proceedings, as entered in the books of the Consistory Court, were annexed to the affidavit; and the material part of them was as follows. Mr. *Ricketts* was cited in the Consistory Court, in a cause of subtraction of church rates, and appeared personally. The libel, as amended, stated that the churchwardens for 1829, being about to expend money

(*a*) Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

on

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on the repair of the parish church and for other things relating to the office of churchwardens, met, *January* 1st, 1830, with some of the most substantial inhabitants of the parish, pursuant to legal notice, in order to make a church rate or assessment, and did make a rate at three pence in the pound, &c.; that Mr. *Ricketts*, at the time of the making the rate, was an inhabitant, and occupied within the parish property of certain value (specified in the libel), for which he was assessed (as specified in the libel), in 4*l.* 6*s.* 3*d.*; and that he had several times been requested to pay the same, but refused, and still did refuse to pay. Mr. *Ricketts* prayed to be furnished with the churchwardens' accounts for 1827, 1828, and 1829, which the judge decreed. Certain accounts having been delivered into Court, in obedience to this order, *R.* objected to them as incomplete; and the judge, upon inspection, declared them to be incomplete. Accounts having again been delivered in, *R.* still objected to their incompleteness: the judge, on *R.*'s petition, having previously allowed him time to give his personal answers, now allowed further time, upon which the proctor on the other side waived the personal answer of *R.* At the next court, *R.* applied for costs, in consequence of the opposing proctor having waived his personal answers, upon which the judge took time to deliberate. The witnesses in support of the libel were then produced; and, upon *R.* objecting to their production, they were admitted by the judge. *R.* having failed to appear at the four next successive courts, the cause was concluded at the last of these, and *R.* monished to attend and hear sentence at the next court. He appeared at the

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the next court, and protested that he had not been duly monished, which the proctor on the other side denied; and the judge read and passed sentence; by which it was declared that the proctor of *John Bodenham*, &c., had prayed for justice to his party, but that *R.* had made no prayer, and that the said proctor had fully proved, &c., and that nothing, or at least nothing effectual, had been proved, &c., on behalf of *R.*; and the judge decreed that *R.* ought to be condemned, and did condemn him, in the rate of 4*l.* 6*s.* 3*d.* with costs.

Sir *Frederick Pollock*. The Court will not refuse to revise their judgment, ex debito justitiæ, if it shall appear to have been founded on a misconception as to the facts. It is now shewn that the validity of the rate does not appear to have been questioned on the face of the proceedings; therefore the prohibition must go, for want of jurisdiction appearing, according to the rule referred to before, that, in the case of inferior courts, nothing will be intended in favour of the jurisdiction. That rule was affirmed in *Winford* v. *Powell* (*a*), *Trevor* v. *Wall* (*b*), *Higginson* v. *Martin* (*c*). [*Littledale* J. Those are cases of common law courts, which are inferior to the Courts of *Westminster* Hall; but ecclesiastical courts are not so.] The fact that this Court will restrain the ecclesiastical courts by prohibition shews that they are inferior to this Court, so far as the present argument is concerned; though, in some sense, they may be termed superior courts. An attempt was made to obtain a prohibition against the Lord Chancellor, sitting in bank-

(*a*) 2 *Ld. Raym.* 1310. (*b*) 1 *T. R.* 151. (*c*) 2 *Mod.* 197.

ruptcy,

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ruptcy, which failed (*a*). [*Littledale* J. Prohibition lies to the courts of a county palatine, if they hold plea of lands out of the county (*b*)]. Here, however, the want of jurisdiction does appear on the face of the proceedings; for the claim appears to be less than 10*l.*, which takes the jurisdiction from the spiritual court, unless it appear on the record that the parties had previously been before justices. [*Coleridge* J. Nothing appeared to raise the question of jurisdiction except the amount; and, by the statute, if the validity be questioned, the jurisdisdiction of the ecclesiastical court is as it was before.]

Cur. adv. vult.

Afterwards, in the same term (*May* 9th), Lord DENMAN C. J. said,

The Court has looked into this question, but does not consider it necessary to add to what was previously said. There will be no rule.

Rule refused.

(*a*) In *Ex parte Cowan*, 3 *B.* & *Ald.* 123. No express decision was given on the question, whether the Court of King's Bench could prohibit the Lord Chancellor sitting in bankruptcy: but the prohibition was refused, on the ground that no excess of jurisdiction appeared in the particular case.

(*b*) *Com. Dig. Prohibition* (A 1.). That the courts of the counties palatine are superior courts, see *Peacock* v. *Bell*, 1 *Saund.* 73.

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P. contracted with a shipbuilder to build him a ship for a certain sum, to be paid by instalments as the work proceeded; the first instalment when the vessel was rammed, the second when she was timbered, &c. An agent for *P.* was to superintend the building. The vessel was built under such superintendence, all the materials being approved by the agent before they were used. The builder became bankrupt before the ship was completed. Afterwards the assignees completed the ship. All the instalments were paid or tendered. In an action of trover by *P.* against the assignees for the ship:

TROVER for a ship. Plea, the general issue. The plaintiffs were merchants, carrying on business at *Newcastle upon Tyne*, under the firm of *Clarke, Plummer*, and Co.; the defendants were the assignees of *John Brunton*, a bankrupt. On the trial before *Alderson* J. at the *Durham* Spring assizes, 1834, a verdict was found for the plaintiffs for 1002*l.* 11*s.*, subject to the opinion of this Court on the following case.

On the 24th of *February*, 1832, *Brunton*, before his bankruptcy, contracted, by a written agreement, to build a ship (not now in question) for the plaintiffs, and the contract was performed on both sides. The agreement commenced with a specification, stating, under several heads of "dimensions," "scantling," "stores," &c., the manner in which the ship was to be built, the materials to be used, and the outfit to be furnished; and it then proceeded as follows: "It is agreed between Mr. *John Brunton* of *Southwick*, shipbuilder, and *Clarke, Plummer*, and Co. of *Newcastle*, that the said Mr. *John Brunton* will build a vessel of the before-mentioned dimensions and scantlings, in every point fully equal to the *Andromeda* in workmanship, and fit said hull out with the materials of the sizes and descriptions before

Held, that, on the first instalment being paid, the property in the portion then finished became, by virtue of the above contract, vested in *P.*, subject to the right of the builder to retain such portion for the purpose of completing the work and earning the rest of the price; and that each material subsequently added became, as it was added, the property of *P.* as the general owner.

Held, further, that under the above circumstances the ship did not pass to the assignees as having been in the possession, order, or disposition of the bankrupt by consent of the true owner, within stat. 6 *G.* 4. *c.* 16. *s.* 72.

named,

named, all of approved quality, &c. Mr. *Benjamin Heward* to superintend the building and outfit. The vessel to be launched in the month of *July* next ensuing: for the sum of 3250*l.*, payable as follows:

"When rammed, by bill at three months' date, to the amount of - - - -	£400
"When timbered, the like payment of -	400
"When decked, the like payment of -	400
"When launched, the like payment of -	500
"The residue or balance, one half at four months and six months date, to the amount of -	1550
	£3250

"*John Brunton* for self and Co.

"Signed at *Southwick*, 24th *February* 1832.

"*Thomas Clarke.*"

"1832, *March* 22d. Agreed with Mr. *Brunton* to make the vessel six inches deeper, say to be 17½ feet deep, for which he is to be paid 25*l.* On same day arranged with Mr. *Heward* to inspect the building of the vessel, for which he is to be paid the sum of 40*l.*

"*Thomas Clarke.*"

On the 5th of *July* 1832, *Brunton* contracted in writing with the plaintiffs to build them another ship, the subject of this action. The agreement was as follows: —

"*Southwick*, 5th *July* 1832.

"Messrs. *Clarke, Plummer*, and Co. *Newcastle.*

"Sirs,

"I agree to build you a vessel of the following dimensions for the sum of 3400*l.*;" (here followed a statement of dimensions); "to be finished in every

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respect similar to the vessel I contracted to build for you on the 24th of *February* last, with the exception of the anchors, which for the present vessel are to be of the weights," &c. "The vessel to be launched in the month of *December* next, and to be paid for in the same way as the vessel already alluded to. I am, sirs, yours respectfully,

John Brunton."

"Mr. *Heward* to superintend the building of the within named vessel, and to be paid 40*l.* for the same.

T. C."

Brunton proceeded to build the last named vessel in his yard at *Southwick*, and before his bankruptcy the vessel was rammed and timbered. Two instalments of the agreed price, viz. 400*l.* when the vessel was rammed, and 402*l.* 11*s.* when the vessel was timbered, were paid according to the agreement, before the bankruptcy; and the plaintiffs also paid *Brunton* before his bankruptcy 200*l.* by way of anticipation on the third instalment: the payments before the bankruptcy amounting in all to 1002*l.* 11*s.*

Brunton became bankrupt in *October* 1832, after the ship was all timbered and planked (except about five planks outside), but not decked. The fiat issued, *November* 1st 1832, and the defendants were appointed assignees on the 16th.

The frame of the vessel at the time of the bankruptcy, on the 15th of *October* 1832, was worth 160l*l.* 13*s.* 7*d.*, that being the value of the timber and the work done upon her. After *Brunton* became bankrupt, the defendants as assignees took possession of the whole of the ships, timber, goods, chattels and effects in

in *Brunton*'s yards and premises, and, amongst other things, of the frame of the vessel in question.

On the 27th of *November* 1832, the plaintiffs gave notice in writing to the defendants, then in possession of the frame of the said vessel, that the same was the property of *Clarke, Plummer*, and Co.; and they required the defendants to give up possession, threatening legal proceedings on non-compliance. They did not at that time tender any money. A week or two after *Christmas* 1832, the defendants proceeded to complete the vessel, and, on the 7th of *February* 1833, the plaintiffs gave the following notice to the defendants, addressed to them as assignees of *Brunton*: —

"Messrs. *Clarke, Plummer*, and Co. having been informed that, in finishing the vessel contracted to be built for them by *John Brunton*, you are not proceeding in a proper and sufficient manner and according to the terms of such contract, we do therefore give you notice that they require that Mr. *Heward*, the person appointed by them to superintend the building of the said vessel, shall be allowed to inspect and superintend the same accordingly; and, if you refuse to accede thereto, and the said vessel should be found, when finished, to be deficient in any respect from the terms of the said contract, they will hold you personally responsible for such deficiency."

On *March* 1st, 1833, when the third instalment would have become payable according to the terms of the contract, if no alteration had been produced by the bankruptcy, 200*l*., as the balance of the said third instalment, was tendered by the plaintiffs to the defendants and by them refused. On *March* 23rd, 1833, the ship was

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launched. A bill at three months for 500*l.*, as for the fourth instalment, was tendered by the plaintiffs to the defendants, and refused. The defendants afterwards sold the vessel for 2600*l.* Before the sale was completed, the plaintiffs tendered to the defendants 1750*l.* (making, with 1002*l.* 11*s.* paid as before mentioned, 2752*l.* 11*s.*) in payment for the vessel, and demanded the vessel from them, which they refused. It was admitted on the trial that the vessel was never of greater value than 2700*l.*

Heward, the person appointed under the agreement to superintend the building of the vessel, was called as a witness for the plaintiffs, and stated that he was, during the building of the said vessel, duly authorized by them to superintend the building on their behalf. That he had been engaged in superintending the building of other vessels, as well for the plaintiffs as other persons, in *Brunton's* and in other shipbuilding yards. He proved that, when the pieces of timber for the vessel were ready for the keel stem and stern-post, he was sent for by *Brunton* to look at them previously to their being prepared for those purposes. That he went with *Brunton* and inspected them; and, when he had approved of them, they were immediately prepared; and, when they were ready to put together, he attended and saw the ram set up. That *Brunton* shewed him the plan of the vessel, and consulted with him thereon, which he approved; and, from that time until *Brunton's* failure, he attended at the building yard daily, to inspect and superintend the work on behalf of the plaintiffs. That three or four times, or more, during the progress of the work, he had occasion to reject parcels of timber and other things that were about to be put into

into the vessel, on account of their insufficiency; and upon his making objection thereto they were removed. That *Brunton* once persisted in putting a timber into the ship, which *Heward* had objected to, on which occasion one of the plaintiffs, at *Heward*'s instance, attended, and insisted on its being removed, and it was by *Brunton*'s orders removed accordingly. That *Heward* had for several years been employed to inspect ships for various persons in the progress of the building, and that he never knew an instance of a single timber or plank, that had been passed by him and fixed in the vessel, having been afterwards removed by the builder, or timbers approved by him for building afterwards used by the builder, unless for the purpose of completing the vessel under his inspection. *Brunton*, after his failure, and when he understood the defendants were proceeding to finish the vessel, attended at the building yard, and stated that he had come there to inspect the progress of the work on behalf of the plaintiffs as usual; this he did for several days, until he was ordered off the premises by the foreman at the instance of the defendants.

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Evidence was offered, on the part of the defendants, that the vessel was in the order and disposition of the bankrupt as reputed owner at the time of the bankruptcy, which evidence was rejected.

The questions for the Court were, whether, under the circumstances above stated, the plaintiffs were entitled to maintain trover? If they were, the verdict was to be entered for the plaintiffs, damages 1002*l.* 11*s.* If not, a nonsuit to be entered. Secondly, whether the evidence as to reputed ownership was properly rejected? If so, the verdict was to stand; if not, there was to be a

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new trial. This case was argued in last *Michaelmas* term (*a*).

W. H. Watson for the plaintiffs. First, under the agreement of *July* 1832, referring to that of *February* 1832, the property in the successive portions of the vessel, as they were completed, vested in the plaintiffs. *Brunton*'s agreement was, not to furnish the plaintiffs with *a* vessel at a given date, but to build a specific and particular vessel, to be paid for at intervals as the work went on, and to be constructed under the superintendence of a person acting on the plaintiffs' behalf, and who was to approve of every timber. *Woods* v. *Russell* (*b*) was a similar case, and the words of *Abbott* C. J. there (*c*) are a direct authority for the plaintiffs. "This ship is built upon a special contract, and it is part of the terms of the contract, that given portions of the price shall be paid according to the progress of the work; part when the keel is laid, part when they are at the light plank. The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship, and that, as between him and the builder, he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other." This, indeed, was not the ground on which the case was decided: but the opinion of the Lord Chief Justice is express. He distinguishes the case from *Mucklow* v. *Mangles* (*d*), "because the bargain there for building the barge does not

(*a*) *November* 13th. Before *Patteson*, *Williams*, and *Coleridge* Js. Lord *Denman* C. J. was absent, being unwell.

(*b*) 5 *B.* & *Ald.* 942. (*c*) P. 946. (*d*) 1 *Taunt.* 318.

appear

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appear to have stipulated for the advances which were made, and those advances do not appear to have been regulated by the progress of the work:" and he observes that the opinion of *Heath* J. appears to have been founded on the notion that the builder was not obliged to deliver the specific barge, but might have substituted another. Here that could not have been done. Each part of the vessel, as it was approved of by *Heward*, became specifically appropriated. The judgment of *Abbott* C. J., founded upon the appropriation of the materials, and the mode of payment, is conformable to the rule of law laid down in 2 *Bla. Comm.* 448. "As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he tenders the price agreed on. But if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them." In *Atkinson* v. *Bell* (*a*), where it was held that the machines manufactured for the defendants did not become their property without actual delivery, the judgment proceeded on the want of any specific appropriation of the materials, and the right which the maker had over them while the work was in progress. *Bayley* J. there said, "The case of *Woods* v. *Russell* (*b*) is distinguishable. The foundation of that decision was, that as by the contract given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price the ship was irrevocably appropriated to the person paying the money. That was a purchase of the specific

(*a*) 8 *B.* & *C.* 277. (*b*) 5 *B.* & *Ald.* 942.

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articles of which the ship was made." In *Carruthers* v. *Payne* (*a*) the plaintiff ordered a chariot to be built, and paid for it; and, after it had been finished in other respects, desired to have a front seat added; but, the order not being performed, he sent for it, and the builder promised to deliver it. The builder became bankrupt; his assignees seized the chariot; and, it being contended that trover did not lie at the suit of the plaintiff, *Best* J. said, "If the article in dispute had rested as it was immediately after the bargain, perhaps there might be ground for the objection, and the case might fall within the principle of the decision in *Mucklow* v. *Mangles* (*b*);" "although, if a case precisely the same as *Mucklow* v. *Mangles* (*b*) were to occur again, it might require further consideration. But the present case is very different from that; for here both the builder and purchaser treated the chariot as finished; the whole of the price was paid, and the plaintiff sent for it several times." *Park* J. also doubted whether he should adopt the decision in *Mucklow* v. *Mangles* (*b*), if such a case were to occur again. The present case, however, falls within the authority of all those cited, because here, by the contract, there was a specific appropriation of the several parts as they were finished, and payment made or tendered for each successively. The payments and tender left the assignees no lien. It may be said that, when the third instalment was due, the whole 400*l.* should have been tendered, without regard to the 200*l.* paid in advance; but the payment of that sum to the bankrupt was payment to the assignees. Besides, even if the plaintiffs had not shewn a sufficient tender, and

(*a*) 5 *Bing.* 270. (*b*) 1 *Taunt.* 318.

demand

demand and refusal, it is immaterial, because there was a direct conversion by selling and disposing of the ship.

Then, as to reputed ownership; to support a claim by the assignees on that ground, the bankrupt ought to have had the ship in his possession, order, and disposition, "by the consent and permission of the true owner," according to stat. 6 *G.* 4. *c.* 16. *s.* 72. But, to give consent, the owner ought to be entitled to possession. Here, the ship was not to be delivered till complete: in the mean time *Brunton* was entitled to the possession. That being so, the reputation of ownership was immaterial; and evidence of it ought not to be admitted. The credit which the bankrupt may have obtained by holding the property is, in itself, of no weight: the case is not within sec. 72. of the statute, unless the bankrupt, at the time of the act of bankruptcy, had possession by the owner's consent and permission. It was so considered in *Smith* v. *Topping* (*a*) and *Carruthers* v. *Payne* (*b*), in which cases possession was held against the wish of the true owner, and in *Muller* v. *Moss* (*c*), where the bankrupt did not hold by permission, but had a right for the time, which case more resembles the present. In *The Earl of Shaftesbury* v. *Russell* (*d*), where the party in possession of goods had only a limited use of them, and that under the provisions of a will, and not by any consent of the trustees, who were the true owners, it was held that, "if he had been a trader and a bankrupt, and had had the goods in his possession at the time of his bankruptcy, under the circumstances

(*a*) 5 *B.* & *Ad.* 674. See *Shaw* v. *Harvey*, 1 *A.* & *E.* 924, note (*a*).
(*b*) 5 *Bing.* 270. (*c*) 1 *M.* & *S.* 335.
(*d*) 1 *B.* & *C.* 666.

stated

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stated in this case, they would not be considered as in his order and disposition with the consent of the true owner, within the meaning of the 21 *Ja.* 1. *c.* 19."

Coltman, contrà. As to the first point; *Woods* v. *Russell* (*a*), the case chiefly relied upon for the plaintiffs, was not decided on the ground stated by *Abbott* C. J. in the passage which has been cited; the decision proceeded on the fact that the bankrupt had signed a certificate to enable the defendant to have the ship registered in his own name; and, in the subsequent cases in which *Woods* v. *Russell* (*a*) is referred to, this is always pointed out. *Battersby* v. *Gale and others* (*b*), in which this

(*a*) 5 *B.* & *Ald.* 942.

(*b*) This was an action of trover against the assignees of *Brunton*, a bankrupt, for an unfinished ship. At the trial before *Gurney* B. at the *Lancaster* Spring assizes, 1833, it appeared that *Brunton* had contracted with the plaintiffs to build them a ship (under the inspection of their agent) for a certain price, which was to be paid by instalments, three of the instalments as the work proceeded, and the last, which was much larger than the others, when the ship was launched and complete. After the first instalment had become due, part of the ship being finished, the plaintiffs paid *Brunton* on account 1000*l.*, which more than covered the first instalment. *Brunton* became bankrupt before the second instalment was due. The plaintiffs demanded the frame of the ship, alleging that the sum they had paid beyond the first instalment bore the same proportion to the second instalment as the work completed since the first instalment was payable bore to the work which should have been done since the first instalment became payable, to make the second instalment payable. The defendants refused to give up the frame, alleging that the whole work done was worth more than 1000*l.* Evidence of value was given on both sides. The learned Judge left it to the jury whether the ship, in the state she was in when the work stopped, was or was not worth more than 1000*l.* The jury were of opinion that she was at that time worth 1102*l.*, and, under the learned Judge's direction, they found a verdict for the defendants. In the next term (*April* 16th), *Wightman* moved for a new trial on the ground of misdirection, contending that the true question for the jury was, whether the amount paid beyond the first instalment was or was not proportionate to the work done since that instalment was payable,

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this Court refused a rule nisi for a new trial, in *Easter* term 1833, is, to some extent, an authority on the present question. In that case the motion was grounded on the judgment of *Abbott* C. J. in *Woods* v. *Russell* (*a*); but it is evident, from the intimation of opinion then given, that, if a decision had been necessary, the law laid down in that judgment would not have been fully recognized; for it was asked whether, if the instalment paid had been less than the value of the work upon the performance of which that instalment was payable, the builder would not have had a lien for the residue. If that were so, the purchaser could not, by paying the instalments, acquire the property in the successive portions of the ship, unless the amount of each instalment precisely equalled the value of the corresponding portion of the work. If *Woods* v. *Russell* (*a*) had been a clear authority on the point now in question, *Goode* v. *Langley* (*b*) might have been decided on the ground

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payable, reference being had to the contract price, and not to actual value; and he cited the passage referred to in the text, from the judgment of *Abbott* C. J. in *Woods* v. *Russell*, 5 *B.* & *Ald.* 946., and *Atkinson* v. *Bell*, 8 *B.* & *C.* 277., as recognising the law there laid down, which, he contended, was applicable to the present case. *Parke* J. observed that, unless the instalments were exactly adjusted to the value of the several parts of the work upon the completion of which they were to become payable, it might be that, when an instalment became due, the work then finished might be worth more than the instalment; and he asked whether, in that case, the ship-builder would not have a lien for the excess? To which *Wightman* answered that, if that were so, still the amount for which the lien attached must be regulated by the contract price; whereas this case had gone to the jury upon the question of general value. The Court (Lord *Denman* C. J., *Littledale*, *Parke*, and *Patteson* Js.) took time to confer with *Gurney* B.; and in the same term (*April* 26.) Lord *Denman* C. J. said that the learned Judge had reported to the Court that the ground upon which the case was put in moving had not been taken at the trial; and consequently the rule was refused.

(*a*) 5 *B.* & *Ald.* 942. (*b*) 7 *B.* & *C.* 26.

that

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that the gig seized in that case had become the plaintiff's property before it was taken by the sheriff; but the Court declined entering upon that point. [*Patteson* J. In that case there was no arrangement, as here, for paying by instalments. The present case is put by the plaintiffs as if the ship were several ships, or several parcels of goods, and the property in each vested as the instalment was paid. Then, after an instalment had been paid, a part of the ship, which was complete, would be vested in the plaintiffs, and a part, which was being completed, in the bankrupt. It would seem that they would be tenants in common.] The parties here contemplated an entire contract. The plaintiffs wished to have a complete ship; and this mode of payment was arranged for the mutual accommodation of the parties, and not with a view of appropriating parts of the work as it went on. With the property a risk would pass; and it is not to be supposed that the plaintiffs meant to incur that risk before they received the ship. The appointing of a superintendent was only to secure the plaintiffs against the putting in of bad materials as the work proceeded. *Abbott* C. J. said, in *Woods* v. *Russell* (*a*), that the payment by instalments had the effect of specifically appropriating the very ship in progress; but, supposing the parts to be so appropriated, it does not follow that the property in them passed. There may be an agreement to appropriate particular materials to a work; and, after the work has been executed to a certain extent with those materials, the purchaser may be entitled to bring an action if he is deprived of them; but yet the property may not vest

(*a*) 5 *B.* & *Ald.* 946.

in

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in him as the work proceeds. If it does, at what time does the vesting take place? Does each stick of timber become the property of the plaintiffs as it is put in? or does a property pass in each distinct portion of the frame as it is completed? [*Watson.* The plaintiffs say that each particular portion of the ship passed to them, as it was completed. As a stick of timber was put in, that, and the whole ship with it, so far as the work was completed, became their property. The effect of the payments was only to devest the builder's lien. *Coleridge* J. Then you argue that the property passed independently of any payment of instalments.] If the property in each piece of timber passes at the time when it is put in, at what price does it pass? At the market price of the day? That may be very different from the artificial value (if it may be so termed) which the piece acquires from the use made of it in the work. Or will it be said that, as the value of the whole ship is to the value of the particular piece of wood, so shall the whole price be to the price of the piece of wood? But this is not the contract of the parties. To apply the question more particularly to the present case. The value of the frame, as it stood between the times for payment of the second and third instalments, was 1600*l.* Did the property vest in the plaintiffs at that price? If so, it became afterwards vested at a different price; for, when the third instalment became due, the builder was entitled to only 1,200*l.* And, if the plaintiffs could not then have demanded the frame without a tender of the remaining 400*l.*, it cannot consistently be said that the plaintiffs acquired the property on paying the instalment. If the passage cited from 2 *Bla. Comm.* 448. were applicable, the property in so much

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much of the work as might from time to time be done would pass as soon as the contract was made; the instalments might be dismissed from consideration, and the supposed authority of *Woods* v. *Russell* (*a*) would be unnecessary. [*Patteson* J. In that passage *Blackstone* is speaking of a sale of goods, not a contract for work.] As no property vested, in this case, during the progress of the work, no question could arise as to lien, nor can the payments be accounted for as intended to devest it. Suppose the bankrupt had, between the times for paying the first and the second instalment, refused to complete the work: if the plaintiffs had then required him to deliver so much as was completed, he could not have insisted on his lien. The plaintiffs might have said, "You have a right to detain the work for the purpose of finishing it; but, unless you finish it, you can have no right to hold it on a claim of lien." The assignees can have no right which the bankrupt would not have had, except that they may repudiate the contract. But, so doing, they can have no lien. If they could, they would also have a right of action for the money; but an assignee cannot renounce the contract, and yet sue in respect of the work done. It is true that in *Woods* v. *Russell* (*a*) the assignees were held entitled to recover a portion of the fourth instalment, though the work had not been completed; but the Court there thought the non-completion waived by the act of the defendant. The rule in the case of sales is that, while any thing remains to be done by the seller before the goods are in a deliverable state, the property shall not pass: *Rugg* v. *Minett* (*b*), *Simmons* v. *Swift* (*c*), *Tarling* v. *Baxter* (*d*).

(*a*) 5 *B.* & *Ald.* 942.
(*b*) 11 *East*, 210.
(*c*) 5 *B.* & *C.* 857.
(*d*) 6 *B.* & *C.* 360.

And

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And it is reasonable that the property, which carries with it the risk, should not be held to pass while any thing remains to be done by the seller. The rule thus recognised with respect to goods sold, applies a fortiori in a case like the present, where the property is changing in its nature and increasing in value while it remains in the workman's hands. [*Coleridge* J. You may be assuming too much in supposing that the risk remains with the builder while the ship is undelivered. If the ship had been burnt, could the plaintiffs have recovered back the instalments?] It is perhaps not material to contend so.

As to the reputed ownership. *Smith* v. *Topping* (*a*) and *Carruthers* v. *Payne* (*b*) differed entirely in their circumstances from the present case. [*Patteson* J. Assuming that the property had passed to the plaintiffs, how does this differ from the case of a ship put into the hands of a builder to repair after a voyage?] In that case the ship has once been notoriously in the possession of the owner. Here the work was never out of the possession of the bankrupt. The case comes within the distinction taken in *Lingard* v. *Messiter* (*c*). [*Patteson* J. The question here turns upon the nature of the possession. The ship was in the hands of the builder for the purpose of a specific work: she was a thing unfinished. There is nothing here of a possession by consent of the owner.]

W. H. Watson in reply. In *Woods* v. *Russell* (*d*) the certificate was one only of many circumstances from which the Court held that the property vested. Here

(*a*) 5 *B.* & *Ad.* 674.
(*b*) 5 *Bing.* 270.
(*c*) 1 *B.* & *C.* 308.
(*d*) 5 *B.* & *Ald.* 942.

the

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the terms of the contract, and the mode of payment, shew that the parties intended the property to pass. *Abbott* C. J. said there, "The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship." [*Patteson* J. With great respect to the authority of Lord *Tenterden*, I should say that that expression is inaccurate. As that case was put, it could not be necessary that a *second* instalment should be paid, to make the property vest.] By the contract here, the plaintiffs were to pay for a particular ship which was in progress. The identical ship was to be delivered. The payments were to be made for the parts of that ship: if she had been burnt while building, the plaintiffs could not in any form of action have recovered back the sums advanced. If the builder had withdrawn that ship and substituted another, it would not have been a completion of his contract. The doctrine laid down in *Woods* v. *Russell* (*a*) is not the opinion of the Lord Chief Justice alone, but that of the whole Court. In *Goode* v. *Langley* (*b*) *Parke* J., then at the bar, admitted in argument that the doctrine in question was established by *Woods* v. *Russell* (*a*). *Battersby* v. *Gale* (*c*) is consistent with the argument for the plaintiffs. A property had passed on part of the vessel being finished, but there was a lien for work done since the instalment had been paid; and the question was how the amount of that lien should be estimated. Here the defendants argue, in effect, that the remedy of the plaintiffs, if the work was not completed, was for a breach of contract, and not for a conversion. But that

(*a*) 5 *B.* & *Ald.* 946. (*b*) 7 *B.* & *C.* 26.
(*c*) Page 458. note (*b*), antè.

is

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is not so. If the bankrupt had refused to complete the work, the plaintiffs might have taken possession, and finished it for themselves without making any tender. Any question of price, at a time between the periods fixed for paying the instalments, might be satisfactorily settled by a jury. The builder and the plaintiffs were not tenants in common. As soon as the property in any part of the ship vested, the rest of the work done, and not paid for, was only work done on the plaintiff's chattel. In *Rugg* v. *Minett* (*a*), and other cases of that class, the right of the purchaser was incomplete till there had been a specific appropriation: here, the article was appropriated and vested in the plaintiffs as the work went on, by force of the contract.

Cur. adv. vult.

WILLIAMS J., in this term (*February* 1st), delivered the judgment of the Court. The principal question raised by this case is, in whom, under the special terms of the contract entered into between the plaintiffs and the bankrupt, *John Brunton*, the general property in so much of the vessel as had been put together at the time of the bankruptcy was vested.

All consideration of any special property which might be in the bankrupt, by reason of a lien for monies expended on the vessel, according to the doctrine laid down in *Woods* v. *Russell* (*b*), is removed from the case by the tender of all such monies which has been made by the plaintiffs: and we desire it to be distinctly understood that, in the judgment which we are about to pronounce, we give no opinion whatever as to the soundness of that doctrine.

(*a*) 11 *East*, 210. (*b*) 5 *B.* & *Ald.* 942.

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On the part of the plaintiffs, it was not denied in argument, nor could be according to decided cases, *Mucklow* v. *Mangles* (*a*), *Simmons* v. *Swift* (*b*), *Rohde* v. *Thwaites* (*c*), *Goode* v. *Langley* (*d*), *Atkinson* v. *Bell* (*e*), *Carruthers* v. *Payne* (*g*), and known principles of law, that, in general, under a contract for the building a vessel, or making any other thing not existing in specie at the time of the contract, no property vests in the party whom, for distinction, we will call the purchaser, during the progress of the work, nor until the vessel, or thing, is finished and delivered, or at least ready for delivery and approved by the purchaser; and that, even where the contract contains a specification of the dimensions and other particulars of the vessel or thing, and fixes the precise mode and time of payment by months and days. The builder or maker is not bound to deliver to the purchaser the identical vessel or thing which is in progress, but may, if he please, dispose of that to some other person, and deliver to the purchaser another vessel or thing, provided it answers to the specification contained in the contract. But it is urged, on the authority of *Woods* v. *Russell* (*h*), that, where the contract provides, as that in question does, that a vessel shall be built under the superintendence of a person appointed by the purchaser, and also fixes the payment by instalments, regulated by particular stages in the progress of the work, the general property in all the planks and other things used in the progress of the work vests in the purchaser at the time when they are put to the fabric under the approval of the superintendent;

(*a*) 1 *Taunt.* 318.
(*b*) 5 *B. & C.* 857.
(*c*) 6 *B. & C.* 388.
(*d*) 7 *B. & C.* 26.
(*e*) 8 *B. & C.* 277.
(*g*) 5 *Bing.* 270.
(*h*) 5 *B. & Ald.* 946.

tendent; or, at all events, as soon as the first instalment is paid. The facts in the case of *Woods* v. *Russell* (*a*) did not make it necessary to determine this point; neither did the decision of the Court proceed ultimately on any such point, but on the ground that the vessel, by virtue of the certificate of the builder, had been registered in the name of the purchaser, and that the builder had, by his own act, declared the general property to be in the purchaser. This appears both by the judgment itself, and by the notice taken of it by Lord *Tenterden* in the last edition of his book on shipping, page 44. But there is a passage in the course of that judgment which goes strongly to establish the point contended for by the learned counsel for the plaintiffs; and, though the opinion expressed in that passage is extrajudicial, yet, considering that time was taken before the judgment was pronounced, and the very great learning of those by whom it was pronounced, we should certainly hesitate very much before we could come to any conclusion contrary to that opinion. The passage is as follows:— (His Lordship then read the passage cited, antè p. 454.)

If it be intended in this passage that the specific appropriation of the parts of a vessel while in progress, however made, of itself vests the property in the person who gives the order, the proposition, in so general a form, may be doubtful.

It seems to be clear that, as, by the contract, the vessel was to be built under a superintendent appointed by the purchaser, the builder could not compel the purchaser to accept any vessel not constructed of materials approved by the superintendent; and, on the other hand,

(*a*) 5 *B.* & *Ald.* 946.

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hand, that the purchaser could not refuse any vessel which had been so approved. It follows that, as soon as any materials have been approved by the superintendent and used in the progress of the work, the fabric consisting of such materials is appropriated to the purchaser; otherwise the superintendent might be called upon, when one vessel had been nearly constructed, to begin his work de novo, and superintend the building of a second: and, in this point of view, the appointment of a superintendent, by the contract, appears to be of considerable importance. As soon as the last of the necessary materials is approved and added to the fabric the vessel is complete; the appropriation is complete; and, assuredly, the general property in the vessel must vest in the purchaser, nothing remaining to be done prior to the delivery; and this is agreeable to the current of all the authorities, most of which have been cited above.

Until, however, the last of the necessary materials be added, the vessel is not complete; the thing contracted for is not in existence: for the contract is for a complete vessel, not for parts of a vessel; and we have not been able to find any authority for saying that, whilst the thing contracted for is not in existence as a whole, and is incomplete, the general property in such parts of it as are from time to time constructed shall vest in the purchaser, except the above passage in the case of *Woods* v. *Russell* (*a*).

Granting therefore that, under such a contract as this, the parts of the vessel, as they are added to the fabric, are appropriated to the purchaser by way of

(*a*) *5 B. & Ald.* 946.

contract,

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contract, so that neither could he refuse them when the vessel should be completed, nor the builder compel him to accept any other, yet it does not necessarily follow that such appropriation vests the property in the purchaser until the whole thing contracted for is in existence, that is, until the completion of the vessel. But, in the passage under discussion, the payment under the contract is relied on as the most material point, the appropriation being effected, as it is said, by that payment: and accordingly, in *Atkinson* v. *Bell* (*a*), Mr. Justice *Bayley*, in alluding to *Woods* v. *Russell* (*b*), says, "that as by the contract given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price the ship was irrevocably appropriated to the person paying the money. That was a purchase of the specific articles of which the ship was made."

Now it is to be observed, in regard to the payment which is relied on in these passages, that, where an actual delivery has taken place, payment is wholly immaterial to the vesting of the property; and further, that, by the modern doctrine and the cases above alluded to, in order to vest the property in goods under contracts of sale, it is only necessary that the identical goods which are the subject of the contract should be ascertained, and the price fixed; and when those things are done the general property vests by the contract before actual delivery; and the payment of the price is quite immaterial for that purpose. Whether that modern doctrine be founded on a misconception of the civil law or not, we do not think it necessary or proper

(*a*) 8 *B.* & *C.* 282. (*b*) 5 *B.* & *Ald.* 942.

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to discuss: the doctrine has been clearly laid down and acted on for many years, and ought not to be lightly disturbed; nor does this case turn upon that doctrine. A doubt may exist whether such a contract as the present be properly a contract of buying and selling; but, assuming it to be so, and we have so treated it for this purpose, the requisites to the vesting of the general property under the contract are clear. The payment of the instalments may indeed be evidence that the purchaser has approved of the fabric so far as it has been constructed, and may therefore as it were ratify the appropriation made by the builder; but in itself it can operate nothing, unless it be by the contract made a condition precedent to the vesting of the property.

It is not so made by the contract in question in express terms; neither was it in the case of *Woods* v. *Russell* (*a*); but we apprehend that the passage above cited from the judgment in that case is founded on the notion that provision for the payment regulated by particular stages of the work is made in the contract, with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and is equivalent to an express provision that on payment of the first instalment the general property in so much of the vessel as is then constructed shall vest in the purchaser. If this notion be correct, the payment is no doubt material to the vesting of the property, and the effect of such payment is, that there is not only an appropriation of so much of the vessel as is then constructed, but also a vesting of the general property in

(*a*) 5 *B.* & *Ald.* 942.

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so much in the purchaser, subject to the right of the builder to retain it in order to complete it, and earn the rest of the price. The rights of the parties will then be in the same state as if so much of the vessel as is then constructed had originally belonged to the purchaser, and had been delivered by him to the builder to be added to and finished; and it will follow that every plank and article subsequently added will, as added, become the property of the purchaser as general owner.

Several reasons may perhaps be adduced to shew that the more obvious intention to be collected from the terms of this contract is that, the builder requiring advances of money in the progress of an expensive work, the purchaser is contented to make such advances, provided he sees the work in such a state of progress as that he may calculate on having an equivalent for his money within a reasonable time; and therefore he stipulates that his advances shall be made at specified stages of the work.

But, even if this be the more obvious intention, it by no means follows that the view taken of the contract by the Court in *Woods* v. *Russell* (*a*) is not correct; for the intention there supposed is not in any respect inconsistent with that which is above suggested; both may well exist at the same time: and though, if it were the intention of the contracting parties that the general property should vest in the manner supposed, such intention might have been expressed in less ambiguous terms, yet, if it can fairly be collected from those which have been used, there is nothing either in principle or

(*a*) 5 *B.* & *Ald.* 946.

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in practice to prevent the Court from carrying it into effect.

On the contrary, as such a construction has been put on a similar contract by so high an authority in the case of *Woods* v. *Russell* (*a*), which as to this point in particular has been subsequently recognised, and as that construction has probably been acted upon, since that decision, by persons engaged in ship-building, we feel that we ought not to depart from such construction; and we adopt the opinion of the Court in *Woods* v. *Russell* (*a*), though with some hesitation for the reasons above assigned.

Another point was raised upon the statute 6 *G.* 4. *c.* 16. *s.* 72. with respect to reputed ownership in cases of bankruptcy, as to which it is sufficient to say that this case is plainly not within the statute; for, although the plaintiffs were the true owners of the vessel, yet it was not in the possession, order, or disposition of the bankrupt within that section, any more than a vessel or other article sent to a builder or manufacturer to be repaired is within that section. We think, therefore, that the evidence as to reputed ownership was properly rejected.

Upon the whole, we are of opinion that the plaintiffs are entitled to maintain this action of trover, and that the verdict must be entered for them for the sum stated in the case, viz. 1002*l.* 11*s.*

Verdict to be entered as above.

(*a*) 5 *B.* & *Ald.* 946.

POWER *against* BARHAM.

Thursday, January 14th.

ASSUMPSIT. The declaration stated that, in consideration that the plaintiff, at the defendant's request, would buy of him four pictures at a certain price, to wit, &c., the defendant "promised the plaintiff that the said pictures were painted by a certain artist or master in painting, called or named *Canaletti*, otherwise *Canaletto*." Breach, that the said pictures "were not, nor was either of them, painted by the said artist or master called or named *Canaletti*, otherwise *Canaletto*," whereby the said pictures were and are of little or no use, &c., and the plaintiff lost the benefits, &c. Plea, non assumpsit. On the trial before *Coleridge* J. at the sittings in *Middlesex* after last term, it appeared that the defendant sold the pictures to the plaintiff for 160*l.*, and, at the time of the sale, gave the following bill of parcels and receipt: —

"Mr. *N. Power*.

"Bought of *J. Barham*.

"*May* 14th 1832.

Four pictures, Views in *Venice*, *Canaletto*,			£160 0 0
Settled by two pictures	£50 0 0		
And a bill at five months	110 0 0		
	£160 0 0		

"*J. Barham*."

A carver and gilder, who had been employed by the plaintiff to procure original pictures for him, gave evidence of previous representations by the defendant to him

In assumpsit for breach of a warranty of pictures, it was proved, among other things, that the defendant, at the time of the sale, gave the following bill of parcels: — "Four pictures, Views in *Venice*, *Canaletto*, 160*l.*" The Judge left it to the jury upon this and the rest of the evidence, whether the defendant had contracted that the pictures were those of the artist named, or whether his name had been used merely as matter of description, or intimation of opinion. The jury found for the plaintiff, saying that the bill of parcels amounted to a warranty:

Held, that the question had been rightly left to the jury, and that the verdict was not to be disturbed.

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POWER against BARNAM.

him and to the plaintiff, that the pictures were genuine; some doubt, however, was raised as to the expressions actually used. The witness stated that the pictures were in the manner of *Canaletti*, and, at the time of the sale, appeared to him worth the money. A witness experienced in paintings stated that he considered the pictures not to be *Canaletti*'s, and valued them at about 8*l.* each; and some other evidence was given on this point. For the defendant it was contended that the bill of parcels was not a warranty, but only an expression of opinion; and *Jendwine* v. *Slade* (*a*) was cited. The learned Judge, in summing up, told the jury that the pictures were admitted not to be *Canaletti*'s, and that the only question on the pleadings was, whether the promise was made; and he submitted to their consideration, upon the whole of the evidence, whether the defendant had made a representation, as part of his contract, that the pictures were genuine, not using the name of *Canaletti* as matter of description merely, or as an expression of opinion upon something as to which both parties were to exercise a judgment, but taking upon himself to represent that the pictures were *Canaletti*'s. His Lordship noticed the argument on behalf of the defendant, as to the bill of parcels; and said that the words of Lord *Kenyon*, in the case referred to, must be considered, not as a general rule of law, but as a direction to the jury on the circumstances of that case. The jury found a verdict for the plaintiff, saying, "We think the bill of parcels is a warranty."

Sir *J. Campbell*, Attorney-General, now moved for a new trial on the ground of misdirection. The ques-

(*a*) 2 *Esp. N. P. C.* 572.

tion

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POWER against BARHAM.

tion was, whether the defendant had entered into a binding contract that the pictures were *Canaletti*'s. The jury ought to have been told that the words in the bill of parcels did not amount to a warranty. *Jendwine* v. *Slade* (*a*) was a stronger case against the defendant than this, because the artists' names there were inserted in the catalogue of sale. But Lord *Kenyon* said, "It was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. What then does the catalogue import? That, in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it. The action in its present shape must go on the ground of some fraud in the sale. But if the seller only represents what he himself believes, he can be guilty of no fraud. The catalogue of the pictures in question leaves the determination to the judgment of the buyer, who is to exercise that judgment in the purchsse." It is not necessary to contend here, that there could not be a warranty of a picture as *Canaletti*'s; but there was no evidence of any. No fraud is imputed. No positive undertaking could be implied, from the bill of parcels, that the pictures were by *Canaletti*. It only implied that they passed for and were believed to be that painter's; that the vendor had bought them as his, and thought them so. It cannot be contended that every description given in a bill of parcels is a warranty. [*Coleridge* J. Do you say that the writing ought not to have gone to the

(*a*) 2 *Esp. N. P. C.* 572.

jury?]

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jury ?] Not as evidence, by itself, of a warranty. [*Coleridge* J. I said that it was to be considered with all the attendant circumstances.]

Lord DENMAN C. J. I think that the case was correctly left to the jury. We must take the learned Judge to have stated to them that the language of Lord *Kenyon* in *Jendwine* v. *Slade* (*a*) was merely the intimation of his opinion upon such a contract as was then before him. It may be true that, in the case of very old pictures, a person can only express an opinion as to their genuineness; and that is laid down by Lord *Kenyon* in the case referred to. But the case here is that pictures are sold with a bill of parcels, containing the words "Four pictures, Views in *Venice*, *Canaletto*." Now words like these must derive their explanation from the ordinary way in which such matters are transacted. It was, therefore, for the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description, or an expression of opinion. I think that their finding was right: *Canaletti* is not a very old painter (*b*). But, at all events, it was proper that the bill of parcels should go to the jury with the rest of the evidence.

LITTLEDALE J. The case was rightly sent to the jury; though, as to their decision, I think that all the auctioneers in *London* would be alarmed if they thought

(*a*) 2 *Esp. N. P. C.* 572.

(*b*) *Canaletti* died in 1768; *Claude Lorraine* and *Teniers* (the younger), the painters mentioned in *Jendwine* v. *Slade*, died, the first in 1682, the latter in 1694.

that

that such words as these were to be understood as a warranty.

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WILLIAMS J. The words in question might be a mere expression of opinion, or might amount to a warranty; it was for the jury to say which they imported. The language ascribed to Lord *Kenyon* seems to imply that, if a master is very old, there can be no means of saying that a certain picture is his, and, therefore, no warranty. The Attorney-General admits that this is not correctly applicable to the present case. If a person will undertake to sell these things as the productions of a particular master, he must take the consequences.

COLERIDGE J. concurred.

Rule refused.

Friday, January 15th.

DOE on the Demise of HOBBS and Others *against* JOHN COCKELL and ELIZABETH, his Wife.

In ejectment by churchwardens and overseers, on demises laid after stat. 59 G. 3. c. 12., it appeared that the defendants, before and since the statute, had paid rent to the successive churchwardens, and that the late churchwardens and overseers (appointed since the statute) had given a proper notice to quit. Defendants produced a lease, made before the statute, for fifty nine years, to parties under whom they claimed, purporting to be made *with the consent of the vicar, the majority of the aldermen and burgesses of the borough of* R. *and of others the inhabitants of the parish*, whose names were subscribed to a memorandum on the back of the lease expressing such consent. The churchwardens were the demising parties, and the rent was made payable to them and their successors for the time being. The premises were described as belonging to the parish church.

On a special case stating these facts: Held that, notwithstanding the consent expressed as above, the premises must be taken to have been parish property, demised by the churchwardens as such: and consequently that the lease passed no legal interest in the term, and the present churchwardens and overseers might treat the lessees as tenants from year to year:

Held, further, that a parishioner, liable to poor's rate, was, at common law, a competent witness for the plaintiff in such action, no evidence being given that the premises were of any annual value beyond that at which they were demised.

EJECTMENT for a messuage and premises in the parish of *St. Mary, Reading, Berkshire.* The demise was laid *May* 1st 1834, and described the lessors of the plaintiff by their names, and as the churchwardens and overseers of the poor of the above parish for the time being. On the trial before *Alderson* B. at the *Berkshire* Summer assizes, 1834, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case: —

The lessors of the plaintiff were the churchwardens and overseers of the parish when the action was commenced, and at the time of the demise laid in the declaration. The defendants and their predecessors had paid rent for the premises to the successive churchwardens, before and since the passing of the statute 59 *G.* 3. *c.* 12., and until the expiration of a notice to quit stated in the case, which was of the same date, in the same form, and signed by the same parties, as that in *Doe dem. Higgs* v. *Terry* (*a*). The defendants put in a lease

(*a*) Antè, p. 275.

of

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of *December* 20th, 1800, between *John Moore* and *William Watlington*, wardens of the parish church of *St. Mary, Reading*, of the first part; *William Blackall Simonds* of the second part; and the Reverend *John Lichfield* and *Hannah* his wife of the third part, and purporting to be made with the consent and agreement of the Reverend *Charles Sturgess*, vicar of the said church of *St. Mary*, and also with the consent of the major part of the aldermen and burgesses of the borough of *Reading*, and others the inhabitants and parishioners of the said parish, whose names were thereon indorsed, whereby, in consideration of the surrender of a former lease therein stated to be vested in the said *W. B. Simonds*, in trust for the said *J. Lichfield* and *Hannah* his wife, and of the sum of 12*l.* therein mentioned to be paid by *Lichfield* and his wife to *Moore* and *Watlington*, the premises now in question, therein described as belonging to the said church of *St. Mary*, were mentioned to be thereby demised to the said *Lichfield* and *Hannah* his wife, their executors, &c., to hold from *Michaelmas* then last, for fifty-nine years, yielding and paying to the said churchwardens and their successors for the time being, wardens of the said church, for the use of the said parish church of *St. Mary*, the yearly rent of 3*l.*, at *Lady-day* and *Michaelmas* The defendants were assignees of the lessees under this lease. The lease had the following indorsement: — "Memorandum; that we, whose names are hereunto subscribed, the parishioners and inhabitants of the parish of *St. Mary*, do consent that the within lease be made to the within named *John Lichfield* and *Hannah* his wife, at such yearly rent, and under such covenants and agreements, as within expressed. Witness our hands, the 20th day of *December* 1800.

Charles

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Charles Sturgess vicar, *W. Blandy*, alderman, *W. B. Simonds*, *James James*, *Francis Lockey*, *Richard Harbert*." It was alleged for the plaintiff, as in *Doe dem. Higgs* v. *Terry* (*a*), that the lease was void; that *Cockell* had held as tenant from year to year; and that the notice had determined that tenancy.

A further question was raised on the competency of a witness named *Hall*, who was examined for the plaintiff, and who stated that he had small tenements in the parish of *St. Mary*, *Reading*, but that they had never been rated, that they were under the value rated in that parish, and that no church rates had ever been demanded or paid in respect thereof; that for thirty-six years he had resided in *Reading*, but for the last ten years he had lived twenty miles from it; and that the tenements belonging to him were occupied by tenants.

The question stated for the opinion of the Court was, whether, under the circumstances, the lessors of the plaintiff were entitled to recover.

Talfourd Serjt., for the plaintiff. Except on the point of evidence, this case does not materially differ from *Doe dem. Higgs* v. *Terry* (*a*); for the lease cannot derive any additional validity from the assent of the parties whose names are indorsed. Then, as to the competency of *Hall*. It was for the defendants to shew that he had a disqualifying interest. The suggestion is that, if these premises were recovered, they would increase the parish funds and reduce the rates. But it is not shewn that they would yield any profit. And the witness was not rated for the property he occupied in

(*a*) Antè, p. 274.

St.

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St. Mary, Reading, nor did that property come up to the value rated in the parish. In *Rex* v. *Kirdford* (*a*) a parishioner, having rateable property, but not rated, was held competent in a question of settlement between his own parish and another, though he had been left out of the rate for the express purpose of qualifying him to give evidence; and the authority of that case is recognised in *Marsden* v. *Stansfield* (*b*). If the witness here were not competent at common law, he is rendered so by stat. 54 *G.* 3. *c.* 170. *s.* 9., provided the subject-matter of the suit be a "matter relating to" the "rates or cesses" of the parish: *Meredith* v. *Gilpin* (*c*), *Rex* v. *Hayman* (*d*), *Heudebourck* v. *Langston* (*e*). *Oxenden* v. *Palmer* (*g*), where the decision was against the competency, does not affect the principle of these cases. If the matter do not relate to the rates or cesses, the witness has no interest.

Ludlow Serjt., with whom was *Talbot*, contrà. First, as to the lease. This is not a demise by the churchwardens, as such, as in *Doe dem. Higgs* v. *Terry* (*h*), but by the churchwardens with the assent of the parties whose names are indorsed on the lease, and who must, therefore, be presumed to have had some interest, and, by virtue of that, to have given a power to the churchwardens to demise. The lease, therefore, was well granted, and is still subsisting. It is true that the rent has been paid to the churchwardens; and the rever-

(*a*) 2 *East*, 559.
(*b*) 7 *B.* & *C.* 818.
(*c*) 6 *Price*, 146.
(*d*) *M.* & *M.* 401.
(*e*) *M.* & *M.* 402. note (*b*).
(*g*) 2 *B.* & *Ad.* 236. And see *Rex* v. *Bishop Auckland*, 1 *A.* & *E.* 744.
(*h*) Antè, p. 274.

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sion may be in the parish officers; but they cannot treat the lease as void, or claim, before its expiration, to take these premises as belonging to the parish within the meaning of stat. 59 G. 3. c. 12. s. 17. Secondly, the witness was incompetent at common law because he came to increase a fund for the discharge of liabilities to which he himself was subject, having property in the parish which might be rated. Nor was he rendered competent by stat. 54 G. 3. c. 170. s. 9. It is clear that, in the contemplation of that statute, a person liable to be rated, as well as one rated, is incompetent as a witness, if the subject-matter of the proceeding do not relate to the rates or cesses. He is an interested party; and the amount of his interest is not to be considered. Here the rates or cesses were not the subject-matter of the action. It had no relation to them, except that, as it is said, their produce would not be so large if the premises were not recovered. The kind of proceeding, in which the statute was intended to remove disqualification, is where the rates or cesses are directly in question, as on appeal against a rate. *Meredith* v. *Gilpin* (*a*) appears not to have been considered good law in *Oxenden* v. *Palmer* (*b*); and the judgment in that case was followed up by the Court in *Rex* v. *Bishop Auckland* (*c*).

Talfourd Serjt. in reply, was stopped by the Court.

Lord DENMAN C. J. The decision in *Doe dem. Higgs* v. *Terry* (*d*) was undoubtedly correct; and there is no distinction between that and the present case. It is true that the vicar and others consented to the lease

(*a*) 6 *Price*, 146.
(*b*) 2 *B.* & *Ad.* 236.
(*c*) 1 *A.* & *E.* 744.
(*d*) Antè, p. 274.

of

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of 1800: but we cannot assume that they had an interest. Nothing is stated beyond their concurrence. The premises appear to be demised by the churchwardens; they, therefore, had an interest in them; and the succeeding churchwardens were always recognised as the parties entitled to rent: I therefore think that the demising parties had no interest but as churchwardens. That interest could not support a demise for the term set up. As to the competency of *Hall*, it is not shewn that he necessarily had any interest, for the premises in dispute may have been let at a rack-rent. No question therefore arises on the statute 54 *G.* 3. *c.* 170.

LITTLEDALE J. The persons whose names are indorsed on this lease are not parties to the demise; there is nothing therefore to shew that the lessors had any authority to demise except as churchwardens. Probably the intention in procuring the consent to be indorsed was only that the demise should not appear to be a job on the part of the parish officers. With respect to the question of evidence, this case differs from *Oxenden* v. *Palmer* (*a*). The object there was to establish a right of taking shingle on the beach; that is, in effect, to get possession of a property for the benefit of the parish; it was as if the parish officers had brought ejectment for lands in another parish; and, consequently, the rated inhabitants were not competent witnesses, unless by the statute 54 *G.* 3. *c.* 170. But this is only a dispute between landlord and tenant. The rent of 3*l.* may have been the full annual value of the premises. It does not appear that *Hall* had any interest

(*a*) 2 *B.* & *Ad.* 236.

in

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in disturbing the relation of landlord and tenant between the churchwardens and the other parties.

Williams J. The present case is not distinguishable from that decided last term. The concurrence of the parties whose names were indorsed on the lease is immaterial: there was nothing to shew that they had any interest. The lessors demised as churchwardens; and the rent was paid to them as such. As to the competency of *Hall*, as *Bayley* J. says in *Marsden* v. *Stansfield* (*a*), "the burden of making out that the witness is incompetent lies on the party who makes the objection." Here it was not shewn by the objecting party that the divisible funds of the parish could be affected by the result of this action.

Judgment for the plaintiff.

(*a*) 7 *B.* & *C.* 817.

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DOD *against* GRANT.

Friday, January 15th.

THE declaration was dated "On the 14th day of *March*, in the year of our Lord 1835," and commenced as follows: — "*Charles Dod* in his own proper person complains of *James Charles Grant*, being in the custody of the Marshal of the Marshalsea of our lord the now King, before the King himself, in an action on promises, for that whereas," &c. Special demurrer for "that, in the beginning of the said declaration, the plaintiff has not followed the rules prescribed by the Court; for it is not stated therein, either that the defendant has been summoned to answer the plaintiff, or that he has been arrested at the suit of the plaintiff, or that he is detained in custody at the suit of the plaintiff:" and that the declaration, in the commencement, is according to the form used before the passing of the act for the uniformity of process, and is not according to the rules and practice now in force concerning the beginnings of declarations. Joinder in demurrer.

A declaration in K. B. beginning in the old form, "*A.* complains of *B.* being in the custody of the Marshal," &c., is not on that account specially demurrable since the act 2 *W.* 4. *c.* 39. and the Rules of *Mich.* T. 3 *W.* 4. For the Court will not presume that the action was not commenced in the Palace Court, and the defendant actually in custody of the Marshal, in which case the declaration would be correct, the act and rules not applying to causes removed from inferior courts.

If the defendant wishes to object to such a declaration in a suit commenced in a superior court, he should not demur, but move to set aside the declaration for irregularity.

John Jervis, in support of the demurrer. By stat. 2 *W.* 4. *c.* 39. all personal actions in the superior courts are to be commenced by such process as is directed in sects. 1. and 4. The former practice, by which a party was placed in a fictitious custody of the marshal, and declared against by the bye, is abolished by the statute; and, if a party is really in custody of the officer of another Court, he need not now be brought into this

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Court to be charged with a declaration; but the act, by sect. 8., and sched. No. 5., gives a form of detainer, which is to state the custody in which the party actually is. If it be true, here, that the defendant is in the marshal's custody, the declaration should state the mode in which the present action is commenced, according to the statute, and according to the form prescribed in the General Rules, *Mich.* 3 *W.* 4. (*a*). In the absence of such statement it may be assumed that the defendant is not actually in such custody, but that the plaintiff is erroneously declaring in the old form. Supposing this were a case removed from the Palace Court, the present form of declaring would not be available. Formerly, the mere fact of a party's being in the custody of the marshal gave this Court jurisdiction, and no process was necessary. Since the act, that is no longer so; and, although the party be in the custody of the marshal, it must be shewn how the jurisdiction attaches. But the plaintiff has no right to demand that the fact of the custody should be assumed. It may be said that the defendant might have moved to set the declaration aside for irregularity; but he is also entitled to demur.

Ball, contrà. The act, by sect. 19., is declared not to apply to causes removed from inferior courts; neither, therefore, do the rules of *Mich.* 3 *W.* 4. (*a*) so apply. The forms given by those rules are not adapted to an action commenced by plaint. And in *Chitty's Forms of Practical Proceedings in the Courts of King's Bench*, &c., 2d ed. 1835, p. 650., the form of commencement of a declaration in K. B., after removal, is that

(*a*) 4 *B.* & *Ad.* 4, 5.

adopted

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adopted here. The present declaration, therefore, may be good as a declaration in a cause removed from an inferior court. And, supposing it to be irregular, the defendant cannot demur. The proper course in such cases is to apply to the Court or a Judge to set aside what is erroneous: *Thompson* v. *Dicas* (*a*), *Harper* v. *Chumneys* (*b*). If an error has been committed here, it is only a misrecital of the writ.

J. Jervis, in reply. It is not necessary to dispute the cases just cited. The objection in those was not, as it is here, that the Court was not shewn to have jurisdiction. The fictitious jurisdiction, formerly claimed by the Courts, being now taken away, the old form used in this Court would no longer be available in the case of a person really in the marshal's custody, any more than the old form in the Exchequer would suffice if the plaintiff were, in reality, a debtor accounting there. The true origin of the jurisdiction must be shewn. It is true that the power of the Court over cases removed is still kept up by sect. 19.; but the forms referable to the fictitious jurisdiction ought no longer to be used in those cases. The declaration should state that the action was commenced by plaint below, and removed hither. Otherwise, the rules laid down under the statute might always be evaded; for, in any case of a declaration like the present, it might be suggested that the statement was consistent with the fact.

Lord DENMAN C. J. The form adopted here is one which may be good or bad according to circumstances

(*a*) 1 *Cro. & M.* 768. *S. C.* 3 *Tyr.* 873. (*b*) 2 *Dowl. P. C.* 680.

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and those circumstances do not appear. We are asked to presume that the defendant is not really in the custody of the marshal, and that the declaration is erroneously commenced in the old form. But we are not to presume against our own jurisdiction if we find that on the record which gives jurisdiction. It is said that, if this be so held, the statute, in a case like the present, is repealed; but that is the defendant's own fault. He should have raised the objection by an application to the Court.

LITTLEDALE J. This commencement would have been regular before the act; and, if the cause is one removed from an inferior court, the act and the rules of *Mich.* 3 *W.* 4. (*a*) have no application. It is said we are to presume that the action was commenced here, and consequently that the Court is without jurisdiction; and that the case of an action commenced in an inferior Court is an exception, within which the plaintiff ought expressly to have brought himself. But that is treating as an exception the case in which the practice is continued as it was before the act. Suppose the act had said that, in ninety-nine cases out of a hundred, the form of proceeding should be as before, but that in the hundredth it should be altered; could it then have been contended that in the ninety-nine cases a party, using the old form, was bound to shew that he did not come within the hundredth? It does not appear that the present action is one commenced by summons, or that it was not removed from the Palace Court; in which case it is not taken out of the rule stated in *Com.*

(*a*) 4 *B.* & *Ad.* 4, 5.

Dig.

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Dig. Pleader (C. 8.), that the plaintiff cannot declare against one in B. R., but *in custodiâ mareschalli*, except where the defendant has privilege, or the action is brought in *Middlesex*. If the declaration is irregular, there should have been an application to set it aside.

WILLIAMS J. If there is an irregularity in the declaration, advantage might have been taken of it by a proper application to the Court. The statement which, according to Mr. *Jervis*, should have been made, that the action was commenced in the Palace Court, is an addition to the forms established under stat. 2 *W.* 4. *c.* 39., which contain no such recital, and need not, because the act does not apply to causes removed from inferior Courts (*a*).

Judgment for the plaintiff.

(*a*) *Coleridge* J. was absent on account of a domestic affliction.

MARGETTS *against* BAYS.

Friday, January 15*th.*

DEBT for work and labour, for money paid, and on an account stated. Pleas, first, nil debet; secondly, "that the supposed debt in the said declaration mentioned, if any such there be, did not, nor did any part thereof, accrue due to the said plaintiff at any time within six years," &c. The plaintiff demurred specially to the second plea, assigning for cause that it did not confess and avoid, or deny, the cause of action, but was pleaded to the supposed debt, if any such there be, instead of admitting the said debt. Joinder in demurrer.

A plea that the "supposed debt, if any such there be," did not accrue within six years, is bad on special demurrer, for not confessing the debt.

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W. H. Watson, in support of the demurrer, cited *Gould* v. *Lasbury* (*a*).

C. Chadwicke Jones, contrà. That was a plea of discharge under the Insolvent Debtors' Act, 7 *G.* 4. *c.* 57.; and there the defendant could not but avow the debt, as he would be under the necessity of inserting it in his schedule in order to obtain the benefit of the act with respect to it, under sects. 40, 46. But there is no reason against a party's saying, "if I ever owed the debt, it is six years since I was first liable;" and this form of pleading is not uncommon. In *Gale* v. *Capern* (*b*), a set off for a promissory note being pleaded, the replication was "that the said supposed debt and cause of set off" did not accrue within six years; and Lord *Denman* C. J., in delivering the judgment of the Court upon the question, what evidence of the making and indorsement of the note was required, said, "The question is, whether this be not a virtual admission that the action did accrue at some time in the manner alleged;" and he added, that "the effect of the replication was, that the plaintiff did so admit." [Lord *Denman* C. J. That was after trial; but here the form of the plea is specially demurred to, which makes all the difference.]

Per Curiam (*c*). The plea in this form cannot be supported.

Leave granted to amend on payment of costs.

(*a*) 1 *C. M. & R.* 254. *S. C.* 4 *Tyrwh.* 863.

(*b*) 1 *A. & E.* 102.

(*c*) Lord *Denman* C. J., *Littledale* and *Williams* Js. *Coleridge* J. was absent: see p. 489., antè.

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The KING *against* The Inhabitants of SPARSHOLT.

Saturday, January 16th.

By the regulations of a bridewell, the turnkeys were to be appointed by the keeper, but the appointment was subject to the approbation and confirmation of the visiting justices. The keeper might suspend, but not permanently displace them without the authority of the visiting justices. They were to receive their salaries from the county treasurer, but in all other respects to be under the immediate orders and control of the keeper:

Held, that an appointment to the place of turnkey, and discharge of its duties under the above regulations at a yearly salary, did not constitute a hiring and service by which a settlement could be gained.

UPON an appeal against an order of two justices for the removal of *Edith Rogers* widow, and her three children, from the parish of *St. Maurice* in the city of *Winchester*, to the parish of *Sparsholt* in the county of *Southampton*, the sessions confirmed the order, subject to the opinion of this Court on the following case: —

By certain of the regulations for the government of the county bridewell at *Winchester*, made at the *Easter* sessions 1822, and allowed and confirmed by the Judges at the summer assises following, it is provided: — 1. That the right of appointment of all turnkeys or assistants employed in the bridewell be vested in the keeper of the bridewell in the first instance; but that such appointment be subject always to the approbation and confirmation of the visiting justices: That the keeper of the bridewell have power to suspend from the execution of the duties of his station any turnkey or assistant, and to appoint a temporary assistant in his room, but shall within three days of such suspension report to the visiting justices the cause for his having so acted, and shall not, until an inquiry has been instituted by the visiting justices, permanently appoint any other person in the room of the turnkey or assistant suspended from office. 2. That the turnkeys of the bridewell shall receive the payment of their salaries from the treasurer of the county, but shall in all other

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respects be under the immediate orders and control of the keeper of the bridewell, by whom they may for disobedience of orders or improper behaviour be suspended from their situations. 3. That the appointment and removal of the keeper of the bridewell shall be made in strict conformity with the acts of parliament for the regulation of the same. 4. That any turnkey of the bridewell, who may be convicted of drunkenness, shall be dismissed by the visiting justices from office. Rule 20. commences thus: — "That no keeper, turnkey, or any other officer attached to the bridewell shall" &c. Rule 21. commences thus: — "That the keeper of the bridewell, and the officers of the prison, together with the keeper's family and servants, shall be required" &c. Rule 26. provides "that the keeper of the bridewell shall not, without the permission of the visiting justices, lodge or board in his house any persons other than his own family and servants, and those of his assistants."

In 1822, and after the allowance and confirmation of the said regulations, *Robert Rogers* (since deceased) was appointed to the office of second turnkey in the said bridewell by the keeper, in accordance with the above cited regulation, at the annual salary of 45*l.* which was afterwards advanced to 50*l.* on his promotion to the office of first turnkey. There was no agreement made, at the time of engaging *Rogers*, for any particular length of service, or for any notice previous to its determination. *Rogers* duly served in that situation from 1822 to 1826, when he married the pauper *Edith*, after which he continued in the same situation till 1833, when he was discharged at a few days' notice for misconduct, in conformity with the above regulations. His salary was always paid by

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by the treasurer of the county, and *Rogers* resided, during the whole period of his employment as turnkey, in the bridewell, which is situate in the parish of *Saint Bartholomew Hyde* near *Winchester*, in the county of *Southampton*.

The question for the opinion of the Court was, whether *Robert Rogers* acquired a settlement by hiring and service in the parish of *Saint Bartholomew Hyde*.

Sir *W. W. Follett* (with whom was *C. Rawlinson*), in support of the order of sessions, was stopped by the Court.

Dampier, contrà. Although the word "officer" is used in the regulations, *Rogers* was in fact a servant. In *Rex* v. *Sandhurst* (*a*) an employment as servant in the Royal Military College at *Blackwater* was held to be such a service as conferred a settlement, though the party was not servant to a private individual, but to the Crown, under the control of a board established for public purposes; on which account it was contended that the employment was rather an office than a service. The present case states that the pauper was appointed (which means hired) at the annual salary (that is wages) of 45*l*. The mention of an annual salary implies that the hiring was yearly, *Turner* v. *Robinson* (*b*), *Fawcett* v. *Cash* (*c*); or, if the words do not ascertain the time, then the hiring is general, and for a year. It may be contended that this is a hiring for a limited service; but so is the hiring of a huntsman, a groom, or a clerk; under which, however, service will confer a settlement.

(*a*) 7 *B.* & *C.* 557. (*b*) 5 *B.* & *Ad.* 789.
(*c*) 5 *B.* & *Ad.* 904.

Lord

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The King against The Inhabitants of Sparsholt.

Lord DENMAN C. J. In *Rex* v. *Sandhurst* (*a*) the sessions doubted whether a person hired into the particular establishment there described could be considered a servant, for the purpose of settlement. I can see no reason why he should not have been so considered. But here the facts are different. The turnkey is not hired by the keeper of the bridewell, for the approbation of the justices constitutes the hiring. The control is in the keeper of the bridewell; but he is not the hiring party. The turnkey is not his servant. Nor is he the servant of the magistrates, for it is not their orders that he is to obey. The case, therefore, is distinguishable from *Rex* v. *Sandhurst* (*a*). I should not feel bound by the particular words used in the case, to come to this decision, if it were not supported, as I think it is, by the nature of the contract itself.

LITTLEDALE J. I also think that the turnkey in this case was not a servant. There is nothing from which the Court can know whose servant he was. He was so far under the control of the keeper of the bridewell as to obey his directions, but was not servant to him. During part of the time, he was assistant turnkey; but that did not make him a servant. The orders must be confirmed.

WILLIAMS J. concurred (*b*).

Orders confirmed.

(*a*) 7 *B. & C.* 557.

(*b*) *Coleridge* J. was absent. See p. 489., *antè*.

The KING *against* The Inhabitants of ST. GILES-IN-THE-FIELDS.

Saturday, January 16th.

Pauper rented a house at 24*l.* a year, which he paid, and resided in the house with his family. He was in the habit of taking in persons to sleep in some of the rooms, letting sometimes a bed, sometimes half a bed, generally by the night, but occasionally for a week, in which case, however, the bed only was let, and the pauper reserved the right of putting another bed into the room. The lodgers had no right to the rooms by day. The pauper had constant access to and control over the whole house, and kept the keys of all the rooms:

Held, an actual occupation of the dwelling-house, within stat. 1 *W.* 4. *c.* 18. *s.* 1.

ON appeal against an order of two justices whereby *Thomas Barrow* and his wife and children were removed from the parish of *St. Giles-in-the-Fields*, in the county of *Middlesex*, to the parish of *St. Marylebone*, in the same county, the sessions quashed the order, subject to the opinion of this Court upon the following case: —

In 1831 the pauper became the tenant of a house in the appellant parish at the yearly rent of 24*l.* He held the house for three years, paid the rent, and complied with all the requisites of the statutes, 6 *G.* 4. *c.* 57., and 1 *W.* 4. *c.* 18., if, under the circumstances after mentioned, he was sufficiently in the occupation of the house in question.

The pauper resided in the house with his family. The furniture in all the rooms was his; and he was in the habit of taking in labouring people to sleep in some of the rooms, sometimes letting a bed, sometimes half a bed, the letting being generally by the night, but in some instances it appeared that a bed had been let for the period of a week. The persons who thus slept in the house had no right to the rooms during the day, the pauper and his family having the constant access to and control over the whole of the house, and the pauper always retaining the keys of all the rooms in his own possession. In the instances of letting for a week, which were of rare occurrence, the pauper let the bed only,

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The KING *against* The Inhabitants of ST. GILES-IN-THE-FIELDS.

only, reserving to himself the right of putting another bed in the same room at any time, if he thought proper.

The question for the opinion of the Court was, whether the pauper actually occupied the house within the meaning of the statute.

Adolphus in support of the order of sessions. The question is, whether the house, in this case, was "actually occupied" by the pauper, within stat. 1 *W.* 4. *c.* 18. *s.* 1. *Rex* v. *St. Nicholas, Rochester* (*a*), and *Rex* v. *St. Nicholas, Colchester* (*b*), shew that it was not. The statute requires an occupation uninterrupted by the rights of any other person. It will be said here that a bed only was let; but the room was let, so far as the right to the bed was concerned. Unless that was so, there could have been no possession of the bed. The landlord could not exclude the lodger. There was a part of the room into which the landlord could not intrude. He was never master of the outer door, while a lodger was entitled to come to one of the beds. The case of an innkeeper is different; he is bound by law to receive persons into his house; and he occupies by his guests. And it is sufficient to say that, if that case arose, it might be decided on its own grounds. The rule which has been laid down for the interpretation of the statute, in the cases already decided, is plain, and ought not to be broken in upon. The word "exclusive," which was used in those cases with reference to the lodger's occupation, ought not to be pressed too far. The true construction of the statute is that, if a person in any manner

(*a*) 5 *B.* & *Ad.* 219. (*b*) 2 *A.* & *E.* 599.

separates

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separates his tenement into parts, and gives up one part, he ceases to be in the actual occupation of that tenement within the statute.

J. L. Adolphus (with whom was *W. Clarkson*) contrà, was stopped by the Court.

Lord DENMAN C. J. It is clear that this was an actual occupation within the statute, although there was something which the pauper did not actually hold at all times, and although the parties, whom he took in, could not have been turned out in the dead of the night. The case of an innkeeper is a very strong illustration of this case, and nearly the same. A person who lives in a house, and merely lets out parts of it in the manner stated here, does not cease to be the actual occupier.

LITTLEDALE J. The facts of this case completely distinguish it from *Rex* v. *St. Nicholas, Rochester* (*a*), where the tenant let a part of the house, and it was actually occupied by another person.

WILLIAMS J. I am of the same opinion. It is true, as has been urged, that it is desirable not to fritter down plain rules, but we must deal with a case according to the facts, and here they put an end to all question (*b*).

Order of sessions quashed (*c*).

(*a*) 5 *B.* & *Ad.* 219.

(*b*) *Coleridge* J. was absent. See p. 489., antè.

(*c*) See *Rex* v. *Pakefield*, p. 612., post.

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The rule, that a statute taking away certiorari does not bind the Crown unless named, is not limited to cases where the Crown has an actual interest, but extends to all prosecutions in the name of the King.

And the rule in favour of the Crown is not defeated by the prosecutor having become nominally defendant; as where a conviction has been quashed at sessions, with costs to be paid by the prosecutor, and he seeks to quash the order of sessions.

By the Game Act, 1 & 2 *W.* 4. *c.* 32., the justices, before whom any person is summarily convicted in penalties under that statute, may adjudge that such party shall pay the penalty immediately or at a future time, and, in default of payment, be imprisoned for a certain period: and it is enacted, that the conviction may be drawn in a certain form (corresponding with the above provision): that the party convicted may appeal to the sessions, giving notice to the complainant of the cause and matter of appeal, within three days after the conviction; and that no such conviction shall be quashed for want of form. A party, summarily convicted under the act, appealed, giving notice of several objections on the merits. By the conviction, when returned to the sessions, it appeared that the party was adjudged to pay the penalty forthwith, and that nothing was said of imprisonment in case of default. The sessions quashed the conviction on this ground, stating in their order that they quashed it for want of form. The objection was not taken in the notice of appeal, nor did it appear that the appellant, when he gave the notice, had means of knowing how the conviction would be framed.

Held that, assuming the conviction to be defective in substance, the sessions had no power to quash it on this objection, no notice of it having been given.

RICHARD PICKERING was convicted by the Rev. *James Roberts*, a justice of the peace for the county of *Warwick*, on the information of *John Boultbee*, Esq., of having committed a trespass, by entering and being, in the day-time, upon a piece of land in the possession and occupation of *John Rowbottom*, in search of game, with a dog and gun, contrary to stat. 1 & 2 *W.* 4. *c.* 32. The adjudication was as follows:—"And I do adjudge that the said *R. P.* shall, for the said offence, forfeit the sum of 1*l.*, and shall pay the said sum, together with the sum of 10*s.* for costs, forthwith. And I direct that the said sum of 1*l.*, being the amount of the said penalty, shall be paid to *John Breedon*, one of the overseers of the poor of the said parish in which the said offence was committed, to be by him applied according to the directions of the statute in such case made and provided. And I do order that the said sum of 10*s.* for costs shall be paid to *John Boultbee*, Esq. the complainant. Given" &c. Within the time prescribed by the act, *Pickering* gave notice of appeal,

which

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which was duly served on Mr. *Boultbee*. Several grounds of appeal were stated in the notice, involving the merits of the information and conviction, and the notice concluded, "And I further give you notice that I am aggrieved by the aforesaid conviction, and shall, on the trial of the appeal aforesaid, insist on all other causes, matters, and things, which I can or lawfully may do." The appeal came on at the Sessions, and, by order of the Court, recited to be made upon full hearing of the said matter, and counsel on both sides, the conviction was adjudged to be quashed, for want of form, with costs, to be paid by Mr. *Boultbee* to *Pickering*. The informality relied upon was, that the Justice did not, by the conviction, adjudge that, in default of the penalty and costs being paid, the party convicted should be imprisoned and kept to hard labour, according to the form given by sect. 39. of the statute (*a*). The causes

(*a*) The material clauses of stat. 1 & 2 *W.* 4. *c.* 32. are as follows: — Sect. 38. enacts, "That the justice or justices of the peace by whom any person shall be summarily convicted and adjudged to pay any sum of money for any offence against this act, together with costs, may adjudge that such person shall pay the same either immediately or within such period as the said justice or justices shall think fit, and that in default of payment at the time appointed such person shall be imprisoned in the common gaol or house of correction (with or without hard labour), as to the justice or justices shall seem meet, for any term not exceeding two calendar months where the amount to be paid, exclusive of costs, shall not amount to 5*l.*, and for any term not exceeding three calendar months in any other case, the imprisonment to cease in each of the cases aforesaid upon payment of the amount and costs."

Sect. 39. enacts, that the justices before whom any person shall be summarily convicted of any offence against this act may cause the conviction to be drawn up in the form subjoined. The form states the conviction, and that the justices do adjudge that the party shall forfeit the sum of &c., "and shall forthwith pay the said sum, together with the sum of —— for costs; and that in default of immediate payment of the said sums, he the said *A. O.* shall be imprisoned [*or* imprisoned and kept to hard labour] in the —— of —— for the space of —— unless the said sums

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causes of appeal mentioned in the notice were not gone into. Application was afterwards made to Lord *Denman* C. J. at chambers, on behalf of Mr. *Boultbee*, for a certiorari to remove into this Court all orders of the Sessions touching the conviction and appeal, and the adjudication thereon. The application was grounded upon several objections to the order quashing the conviction, viz. 1. That the conviction was valid, and not bad for want of form. 2. That, by stat. 1 & 2 *W.* 4., *c.* 32. *s.* 45., no summary conviction under the act could be quashed for want of form. 3. That *Pickering*'s

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sums shall be sooner paid; [*or* and I [*or* we] order that the said sums shall be paid by the said *A. O.* on or before the —— day of —— and in default of payment on or before that day I [*or* we] adjudge the said *A. O.* to be imprisoned [*or* imprisoned and kept to hard labour] in the —— of —— for the space of —— unless the said sums shall be sooner paid]; and I [*or* we] direct" &c. (the penalty to be paid to one of the overseers of the poor, to be applied according to the statute, and the sum of —— for costs to the complainant). "Given" &c.

Sect. 44. enacts, "That any person who shall think himself aggrieved by any summary conviction in pursuance of this act may appeal to the justices at the next general or quarter sessions of the peace to be holden, not less than twelve days after such conviction, for the county," &c. "wherein the cause of complaint shall have arisen, provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or within such three days enter into a recognizance," &c. (to appear and try, to abide the judgment, and to pay costs): "and the Court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the Court shall seem meet; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be dealt with and punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment."

Sect. 45. enacts, "That no summary conviction in pursuance of this act, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by certiorari or otherwise into any of his Majesty's superior courts of record."

notice

notice of appeal did not specify the objection in point of form, upon which the judgment of the Sessions proceeded; and that for want of such specification, which was required by stat. 1 & 2 *W.* 4. *c.* 32. *s.* 44., the Sessions were precluded from entertaining the objection. 4. That, if the conviction was bad for want of form, as objected at Sessions, it was a nullity, and there was nothing to appeal against. 5. That the appeal, as entered with the clerk of the peace, was against the Rev. *James Roberts*, the convicting magistrate, and not against Mr. *Boultbee*, and therefore the Sessions could not order the latter to pay costs to the appellant (*a*); and that the prosecutor of an information was not liable to costs for a mistake of the convicting magistrate. The certiorari was granted; and, the proceedings having been returned, a rule nisi was obtained for quashing the order of Sessions by which the conviction was quashed. A rule nisi was also obtained in the last term for quashing the certiorari. Both rules were now discussed together.

Hill and *Kelly*, against the rule for quashing the order of sessions, and in support of the rule for quashing the certiorari. The power of enforcing this penalty is given by special provision of an act of parliament, which must be followed, or the power fails. By sect. 39., the adjudication should be, that the party pay the penalty, or be imprisoned. This conviction adjudges that *Pickering* do forthwith pay the penalty, without any alternative. The judgment is imperfect, and cannot be enforced. The sessions were bound to quash the conviction on that account. It is indeed

(*a*) This point is not further noticed, as no decision was given upon it.

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stated, in the order of sessions, that the conviction was quashed for want of form, but that is not so; and, whatever the sessions may have adjudged, if, upon the order being brought here, the Court see that it is bad in substance, they will not allow it to have any effect. It is said that the notice of appeal did not set out the objection upon which the conviction was quashed; but it is not denied that the prosecutor in fact had notice of it. The certiorari is taken away in distinct terms by sect. 45. It is true that the certiorari in this case is applied for by the prosecutor of the information; and it may be contended, on the authority of *Rex* v. *Allen* (*a*), that a clause taking away certiorari does not bind the Crown, unless named. But that decision was on a revenue act, and clearly had reference to cases where the Crown is an actual party. Here the proceeding is between individuals; the Crown does not move in it. It may be suggested that, by sect. 38. of the present act, a party may be adjudged to pay the penalty and costs immediately, and that, if such adjudication were made and complied with, and the conviction drawn up afterwards, the alternative form would be inapplicable. But, although it is true that the formal conviction may be drawn up long after the adjudication has taken place, that does not dispense with the necessity of framing it as it should have been framed if made out at the time. In felony, where a particular judgment is prescribed by law, the omission of a material part vitiates the sentence (*b*).

Bere and *Daniel*, contrà. A statute taking away the right of removal by certiorari does not bind the

(*a*) 15 *East*, 333. (*b*) See *Rex* v. *Fletcher*, *Russ. & Ry.* 58.

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Crown, unless there be express words for that purpose; *Rex* v. *Allen* (*a*). That was a prosecution in which the Crown had a direct interest; but the language of the Court there admits of a general application, and the decision was grounded upon a series of cases in which the prosecutors were private persons. *Rex* v. *Farewell* (*b*), *Rex* v. *Clace* (*c*), *Rex* v. *Cumberland* (*d*), *Rex* v. *Bodenham* (*e*), are cases of that description. [Lord *Denman* C. J. Has not the prosecutor in this case become the defendant]? He is only so in form, like the plaintiff below, in a cause where the defendant brings a writ of error. But further, if the conviction was not in pursuance of the act, so that the sessions had no jurisdiction over the case, then, according to the principle admitted in *Rex* v. *Fowler* (*g*), the certiorari is not taken away. Here they had no jurisdiction to make this order. They could not adjudicate upon any matter of complaint which was not stated in the notice of appeal, according to sect. 44. of 1 & 2 *W.* 4. *c.* 32.; and the point on which the sessions decided was not taken in the notice. [Lord *Denman* C. J. The objection probably could not be discovered till the parties came into Court. *Littledale* J. The notice of appeal is to be given within three days after conviction. The conviction would not be drawn at that time.] The party intending to appeal might apply to the magistrates to have it drawn. [Lord *Denman* C. J. Would it be in the power of the sessions to confirm a materially vicious conviction]? The sessions here have stated the defect to be matter of form. [Lord *Denman* C. J.

(*a*) 15 *East*, 333. (*b*) 2 *Stra.* 1209.

(*c*) 4 *Burr.* 2456.

(*d*) 6 *T. R.* 194. *S. C.* in Error, *The Inhabitants of Cumberland* v. *The King*, 8 *B.* & *P.* 354.

(*e*) 1 *Cowp.* 78. (*g*) 1 *A.* & *E.* 836.

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That is their opinion: we may think it substance]. The observation, that the sessions could not confirm the conviction, if materially bad, would apply to cases in which the statute allows more time for the appeal, and where the party intending to appeal has an opportunity of seeing that which he is to appeal against; as under the act for amending the poor law, 4 & 5 *W.* 4. *c.* 76. And, by the statute in question here, the appellant, though he had not seen the conviction, was not necessarily subjected to any hardship. If he had stated, as his ground of appeal, that he was not guilty, he might, under that notice, have taken any substantial objection; *Rex* v. *The Justices of Newcastle upon Tyne* (*a*). But, as he has alleged specific objections, the sessions could not go out of those. And the sessions expressly state that they have quashed the conviction for matter of form, which, by sect. 45. of stat. 1 & 2 *W.* 4. *c.* 32., they are prohibited from doing. As to the objection itself, the statute does not imperatively require that the form there given shall be used. Enough has been adjudged here; and, at all events, the convicted party cannot complain that the full measure of punishment has not been inflicted.

Lord DENMAN C. J. The statute gives an appeal to the sessions, on condition that the appeal be brought not less than twelve days after the conviction, and that notice be given of the appeal, and of the cause and matter thereof, within three days after the conviction, and seven clear days before the sessions: and the sessions are to hear and determine the matter of the appeal, and make such order therein as to them shall

(*a*) 1 *B.* & *Ad.* 933.

seem

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seem meet. Here the convicted party has appealed and given a regular notice. Then what were the cause and matter of appeal stated in the notice? Three objections were stated, all going directly to the merits. Those objections were the matter upon which the sessions were to adjudicate. They were to try the merits. But they have set aside the question as to these, and decided that the conviction was bad in form. The notice could not refer to objections merely on the face of the conviction; for a conviction is seldom drawn till the time of the sessions; and this was probably never seen by the parties before that time. The justices, being as it were impannelled to try the merits of the appeal, have proceeded to try something else. If the alleged defect was merely form, the statute cures it, and precludes them from interfering; if it was an objection in substance to the jurisdiction, and was well-founded, then, although the sessions had confirmed the conviction, no man could have justified the putting it in force: either the conviction was good, or nothing could have been done upon it. Then as to the clause (sect. 45.) which takes away the certiorari; if there had been no decision upon similar clauses in other statutes, it would appear that such a provision bound even the Crown. But it has often been held that the right of the Crown in such cases is not to be taken away unless by express words. In *Rex* v. *Bodenham* (*a*) a distinction was attempted between cases in which the proceeding is actually that of the King, as where the revenue is concerned, and those in which the prosecution is private; and the Court said, "In cases of this sort there is no distinction." That is a direct authority on the point.

(*a*) 1 *Cowp.* 78.

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And again, in *Rex* v. *Allen* (*a*), although the information was for penalties under a revenue act, and although *Grose* J. and *Le Blanc* J., in their judgments, adverted to the nature of the statute, *Bayley* J. relied upon the rule "that general words in an act, that no certiorari shall be allowed, or the like, shall not bind the Crown, unless such an intention is to be collected from other parts of the act." The rest of the Court did not, in their judgments, limit this general doctrine; and no disapprobation was expressed of the decision in *Rex* v. *Bodenham* (*b*), which was cited in argument. It is therefore perfectly clear, after much discussion of the point, that the certiorari is not taken away in the case of the Crown, considered generally as a suitor in a court of justice, and not merely with reference to the enforcement of any particular prerogative in respect of revenue (*c*). The rule for quashing the order of sessions will therefore be absolute, and the rule for quashing the certiorari discharged.

LITTLEDALE J. The general rule is, that the Crown, unless named, is not bound by a statute; and that, in the cases which have been cited, has been held applicable to clauses taking away certiorari. A distinction has been suggested between cases in which the Attorney-General is proceeding directly on behalf of the Crown, or a private prosecutor to enforce a conviction, and where a party, as in this instance, is endeavouring to get rid of the costs of a prosecution in which he has failed, and stands in the situation of a defendant: but that appears

(*a*) 15 *East*, 333. (*b*) 1 *Cowp.* 78.

(*c*) As to the removal of indictments or presentments by the prosecutor, see now stat. 5 & 6 *W.* 4. c. 33. s. 1.

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to me too refined; although the party is called the defendant, that is only by the course of the Court; he is still, in fact, the prosecutor in the proceeding below. Then as to the order of sessions: the cause and matter of the appeal, stated in the notice, and which the sessions were to hear and determine, was confined to three grounds of objection. The sessions, by their order, stated to be made on full hearing of the matter, and counsel on both sides, quash the conviction for want of form. They do not decide the matter of the appeal. Want of form is not mentioned in the notice. It is true that, when notice is given, the party cannot know whether or not there is a defect of form; but, if the statute takes from him the opportunity of raising that objection, it cannot be helped: the sessions are not, therefore, enabled to enter upon matter not included in the notice. They had not, then, any right to make this order; and the more especially, as the statute says that no summary conviction under it shall be quashed for want of form.

WILLIAMS J. I am of the same opinion. The distinction between cases in which the Crown proceeds as upon a private interest, and those in which an individual prosecutes in the name of the crown, is somewhat invidious, and was overruled in *Rex* v. *Bodenham* (*a*). Then as to the ground of decision in the present case. Appeal is a remedy given by statute, and the legislature, in giving, may restrict it. Probably it was intended here that the appellant should be in a great degree precluded from objections on the form of the conviction.

(*a*) 1 *Cowp.* 78.

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The appellant here, in his notice, expressly took grounds which went to the merits only. They were the "matter" of the appeal. It is true that the conviction, as drawn up, was not within his reach when he was obliged to give his notice; but, if the objection arising upon it went to the jurisdiction, then at all events the conviction would not be available; if it fell short of impugning the jurisdiction, it was merely matter of form, and defects in form are cured by the statute. The sessions have quashed the conviction for want of form, and not upon any ground taken by the appellant (*a*).

Rule for quashing the certiorari discharged.

Rule absolute for quashing the order of sessions.

(*a*) *Coleridge* J. was absent. See p. 489., antè.

Saturday, January 16th.

The KING *against* The Inhabitants of AMERSHAM.

Pauper was bound apprentice by an indenture, which stated that 10*l.* had been paid to the mistress as a consideration, out of the funds of a charity. The mistress had agreed with *D.*, the pauper's grandmother (who was no party to the indenture), to take the apprentice for 25*l.*, which *D.* was to pay. The 10*l.* was paid as part of the 25*l.* out of the charity funds; but the mistress, at the time of making the agreement, did not know that this was intended. It did not appear that the trustees of the charity knew of any payment contemplated or made, except that of 10*l.*:

Held, that the indenture was void under stat. 8 *Ann. c.* 9. *s.* 39., for not truly stating the sum paid or contracted for with the apprentice.

ON appeal against an order of two justices, whereby *Anna Seamons* was removed from the parish of *Aylesbury*, in the county of *Buckingham*, to the parish of *Amersham*, in the same county, the sessions confirmed the order, subject to the opinion of this Court upon a case, the material parts of which were as follows: —

William Harding, by his will, dated *August* 5th, 1719, devised estates to trustees to employ the rents and profits

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fits towards putting out poor children apprentices. The respondents proved an indenture made *May* 8th, 1827, between *W. R.*, *W. B. E.*, &c., Esquires, trustees of *W. Harding*'s charity, of the first part; *Anna Seamons*, a poor person, and settled inhabitant within the parish of *Aylesbury*, of the second part; and *Catherine Read*, spinster, of *Amersham*, in the county of *Bucks*, of the third part: whereby *Anna Seamons*, by the nomination and placing of the said *W. R.*, *W. B. E.*, &c., bound herself apprentice to *Catherine Read*, for the term of seven years, to learn the art or business of a dress-maker; and the said *C. Read*, in consideration of the sum of 10*l.* of lawful money to her paid by the said trustees out of the said public charity of the said *W. H.*, covenanted to teach *Anna Seamons* the art or mystery of a dress-maker.

Before the execution of the indenture, *C. Read* attended a meeting of the trustees, held *May* 8th; and afterwards the indenture was executed by *Anna Seamons* and *C. Read*, in the presence of, and attested by, *John Parrott*, agent to the trustees of the charity; and he paid the 10*l.* mentioned in the indenture to *C. Read*, the mistress, as the consideration for taking the pauper apprentice. *C. Read* signed a receipt indorsed upon the indenture as follows: — "Received, on the day and year within written, by me the within named *Catherine Read*, of and from the within named trustees, by the hands of *W. R.* and *W. B. E.*, treasurer, the sum of 10*l.*, being the full consideration money within mentioned to be by the said trustees to me paid. *Catherine Read.*

"Witness *John Parrott.*"

The pauper served three years under the indenture.

The appellants proved that Mrs. *Dawney*, the wife of Mr.

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Mr. *Dawney* the pauper's grandfather, had (by his authority) applied to *C. Read* to take *Anna Seamons* apprentice, in *April* in the same year; and upon that occasion the premium which Mrs. *Dawney* agreed to pay, and which *C. Read* agreed to receive, was 25*l.*; that this arrangement was made at *Amersham*; that *C. Read* did not know, until she came to *Aylesbury* and was introduced to the trustees, that any part of the premium she was to receive was to be paid from the funds of *Harding*'s charity; and, being informed of the fact, was, at first, unwilling to take the apprentice, but eventually consented. After the indenture was executed, *C. Read* received from Mr. *Dawney* 15*l.* to make up the amount which he had agreed to pay, and which she had agreed to receive. Upon her going before the trustees to complete the binding, no conversation took place between her and the trustees, or any of them, or between her and Mr. *Parrott*, respecting any additional sum to be paid to her by Mr. *Dawney* with the apprentice; nor was it in evidence that the trustees, or Mr. *Parrott*, knew or suspected that any additional sum was so paid, or contracted for, beyond the sum mentioned in the indenture.

The question for the opinion of the Court was, whether the indenture was void by reason of the full consideration for the binding not being set out according to stat. 8 *Ann. c.* 9. *s.* 39.

Sir *W. W. Follett* and *Bligh* in support of the order of sessions. The stat. 8 *Ann. c.* 9. *s.* 39. enacts that all such indentures as are there mentioned, "wherein shall not be truly inserted and written the full sum and sums of money received, or in anywise directly or indirectly given, paid, secured, or contracted for, with, or in relation

relation to" the apprentice, shall be void. The meaning is, that the indenture shall state the full sum which the parties to the binding, on each side, contract to give and to receive. A further payment made in pursuance of an agreement not effectual in law, even where the master was party to such agreement, has been held not to avoid the indenture; *Rex* v. *Bourton-upon-Dunsmore* (*a*). Here the contract for payment of 25*l.* was entered into by a married woman. It is true that her husband fulfilled it; but that was after the execution of the indenture. Before that time there was no binding agreement between any parties for the payment of more than 10*l.* In *Rex* v. *Baildon* (*b*), which may be referred to on the other side, the consideration to the master for taking the apprentice was stated in the indenture to be 4*l.* paid by a charity; but the boy's mother, without the knowledge of the trustees of the charity, agreed with the master to give him, and did give him, 1*l.* more: and the indenture was held void; but there the mother was a person capable of contracting, and was party to the indenture. And the subsequent decision in *Rex* v. *Aylesbury* (*c*) renders it questionable whether, even in such a case, an agreement made without the knowledge of the trustees would be such a valid contract that the consideration introduced by it must be stated in the indenture. It does not appear in this case that the trustees knew of any agreement for a larger sum than 10*l.* It would be very hard if the child bound apprentice by them were to lose the benefits of the indenture, by reason of an engagement entered into without their knowledge, with a person to whom they were strangers.

(*a*) 9 *B.* & *C.* 872. (*b*) 3 *B.* & *Ad.* 427.
(*c*) 3 *B.* & *Ad.* 569.

Sir

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The KING *against* The Inhabitants of AMERSHAM.

Sir *J. Campbell*, Attorney-general (with whom was *Channell*) contrà. Mrs. *Read*, who was to receive the money, was a party to the indenture, and she has set out the consideration falsely. (He was then stopped by the Court.)

Lord DENMAN C. J. The decision in *Rex* v. *Aylesbury* (*a*) does not clash with that in *Rex* v. *Baildon* (*b*). In the judgment of Lord *Kenyon* in *Rex* v. *Leighton* (*c*), cited in *Rex* v. *Aylesbury* (*a*), it is said, "The clear meaning of the statute of *Anne* is that where money or money's worth is given to the master by the friends of the apprentice by way of premium, a duty ought to be paid for it; but that where meat, clothes, &c. are to be provided for the apprentice, no duty is payable, because there is not any *thing given to the master*." That judgment was sufficient for the decision of *Rex* v. *Aylesbury* (*a*). The present case falls within the first part of Lord *Kenyon*'s words there cited. It is a penalty, which the statute imposes upon the master, that if, by the statement in the indenture, he cheats the revenue, he loses his controul over his apprentice. And, as to the apprentice, an indenture not duly stamped is void for the purpose of settlement, according to *Rex* v. *Edgeworth* (*d*).

LITTLEDALE and WILLIAMS Js. (*e*) concurred.

Order of sessions quashed.

(*a*) 3 *B.* & *Ad.* 569. (*b*) 3 *B.* & *Ad.* 427.
(*c*) 4 *T. R.* 732. (*d*) 3 *T. R.* 353.
(*e*) *Coleridge* J. was absent. See p. 489., ante.

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The KING *against* BOXALL and Others.

Monday, January 18th.

THIS was an indictment, found at the *Surrey* sessions, against thirty-three defendants, for a conspiracy, and removed, for trial, to the Central Criminal Court. All the defendants but three afterwards pleaded and traversed in the Central Criminal Court, and entered into recognizances, with sureties, to try there. The same attornies acted for all the defendants who traversed. Two of the last-mentioned defendants applied by the same attornies to *Littledale* J. at chambers for a certiorari to remove the indictment into this Court, which was granted, each of the parties giving his own recognizance in 100*l.* and two sureties in 50*l.* each. No security was given in this Court by any of the other parties.

Under stat. 5 & 6 *W.* 4. *c.* 33., as well as by the antecedent practice, a certiorari obtained by one of several defendants removes the indictment as to all, and the previous recognizances of all are discharged, though the parties not applying for the certiorari do not give any fresh security.

Application being made, under such circumstances, for a procedendo, unless the defendants not suing out the certiorari would enter into recognizances, the Court refused a rule to shew cause.

W. Clarkson now moved for a rule to shew cause why a procedendo should not issue. The effect of the certiorari, if sustained, will be that, two of the defendants having removed the indictment by certiorari, all the others who have given recognizances and sureties will be discharged, and the prosecutor will be unable to enforce their appearance. A procedendo, therefore, ought to issue, at all events, unless those parties give security. The new act, 5 & 6 *W.* 4. *c.* 33. *s.* 2., as to certiorari, directs that "every person indicted," &c., who shall obtain a certiorari, not being in custody, &c., shall, before the allowance of the writ, enter into a recognizance, in the sums ordered by this Court or one of its Judges,

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Judges, with the conditions prescribed by former statutes, and thereupon the clauses and provisions contained in the former acts, as to costs or otherwise, shall extend to such recognizances. Here two only of thirty-three defendants have applied to remove the indictment; and the rest offer no recognizance or surety in lieu of those which would be discharged by the certiorari. All the persons indicted should have entered into recognizances, before a certiorari was granted, of which all will take advantage. (He then adverted to facts, alleged on affidavit, as shewing that the prosecutor would be subjected to much hardship and difficulty if the certiorari continued in force.)

Lord DENMAN C. J. The practice is not altered by the late statute. Any one defendant may apply for a certiorari: and the circumstance that, by his obtaining it, the recognizances of the other defendants are discharged, may serve to guide the discretion of a judge as to granting or withholding the writ, but is no ground for a procedendo.

LITTLEDALE J. In a case before me some time ago, I refused to grant a certiorari unless all the parties indicted would enter into recognizances, and they did so; but I found afterwards that, by the practice, if they had not consented, I should have had no right to withhold the writ merely on that account. The new act does not alter the practice.

WILLIAMS J. concurred (*a*).

Rule refused.

(*a*) *Coleridge* J. was absent. See p. 489 antè.

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MORGAN *against* BROWN and Another.

Tuesday, January 19.

A statutory conviction of *A.* and *B.* for an offence several in its nature (as an assault under stat. 9 *G.* 4. *c.* 31.), adjudging that they, the said *A.* and *B.*, for their said offence do forfeit the sum of &c., and in default of payment be imprisoned for the space of &c., is bad, inasmuch as the penalty ought to be imposed on the parties severally, and not jointly. And a party committed under such a conviction may recover in trespass against the committing magistrate.

THIS was an action for an assault and false imprisonment. Plea, not guilty. On the trial before *Williams* J. at the *Shropshire* Summer assizes, 1834, it appeared that the defendants, magistrates of *Shropshire*, had summarily convicted the plaintiff and one *Parker* of an assault, under stat. 9 *G.* 4. *c.* 31. *s.* 27. The conviction was as follows:—"County of *Salop*. Be it remembered, that on &c. *R. Parker* and *E. Morgan* are convicted before us, &c., for that they the said *R. P.* and *E. M.* on &c., at &c., did violently assault one *E. Yapp*. We the said justices do therefore adjudge the said *R. P.* and *E. M.* for their said offence to forfeit and pay the sum of 4*s.*, and also the sum of 6*s.* for costs; and, in default of immediate payment of the said sums as aforesaid, to be imprisoned in the House of Correction at *Shrewsbury* for the space of fourteen days, unless the said sums shall be sooner paid; and we direct that the said sum of 4*s.* shall be paid" &c. (the fine to one of the high constables of the parish where the offence was committed, and the costs to the prosecutor) (*a*). Upon this conviction the plaintiff and *Parker* were committed to the House of Correction. The commitment recited the conviction, and ordered that, in default of immediate payment of the sums therein mentioned, the parties should be imprisoned in the House of Correction for fourteen days, unless the said sums should be sooner paid. Among other objections on behalf of the plaintiff, it was urged that the conviction

(*a*) See the form of conviction, in the case of a single defendant, stat. 9 *G.* 4. *c.* 31. *s.* 35.

was

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was bad, as it imposed a joint fine upon two persons. The learned Judge held this objection fatal, and the plaintiff had a verdict. In the ensuing term a rule nisi was obtained for a new trial, or to enter a nonsuit.

Talfourd Serjt., and *C. Phillips*, now shewed cause (*a*). The fine ought to have been several. The effect of imposing a joint fine on the two parties is that, if one were willing to pay his own proportion, he could not be discharged unless the other paid his. And the adjudication ought to shew that the magistrates have exercised their judgment as to the amount of fine to be paid by each. No instance can be given in which a conviction like this has been supported.

Sir *J. Campbell*, Attorney-General, and *Godson*, contrà. This was not a joint offence, but one for which the parties were liable severally, according to the distinction stated by Lord *Mansfield* in *Rex* v. *Clark* (*b*). By the statute, each might have been fined in the full amount here imposed. Supposing, therefore, that the effect of this adjudication were to subject either to the whole penalty, there has been no excess of jurisdiction. [Lord *Denman* C. J. In *Hawk. P. C.* book ii. *c.* 48. *s.* 18. (*c*), it is said, "that where there are several defendants, a joint award of one fine against them all is erroneous, for it ought to be several against each defendant; for otherwise one who hath paid his proportionable part might be continued in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another."] It is only said that the

(*a*) Three objections to the conviction were relied upon; but the judgment of the Court proceeded wholly upon that above stated.

(*b*) 2 *Cowp.* 612. (*c*) Vol. iv. p. 473. ed. 1795

judgment

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judgment will be erroneous. Here it is sufficient if the conviction be not a nullity. And the case supposed in that passage probably is where the judgment imposes the full fine allowed by law. By 9 *G.* 4. *c.* 31. *s.* 27. a party summarily convicted of an assault is to "forfeit and pay such fine as shall appear to" the justices "to be meet, not exceeding, together with costs (if ordered), the sum of 5*l.*" Here the magistrates have ordered the parties to pay 4*s.* and 6*s.* costs. If the exercise of their authority would not be lawful unless a forfeiture to the whole amount of 4*s.* and 6*s.* was imposed on each, the Court will construe the conviction as having that effect. They have reduced the fine in this case from 5*l.* to 4*s.* It was in their discretion to reduce it still lower. They might reduce it to 4*s.* in the case of one defendant, and nothing in that of the other, but, at the same time, adjudge that both should be imprisoned till the one fine was paid. Then, even according to the view of the case taken on the other side, the proceeding is not invalid.

Lord DENMAN C. J. We are all clearly of opinion, on this objection, that the conviction was bad. The best mode in which the case can be put for the defendants is that, upon the conviction, it is ambiguous whether the parties are adjudged to forfeit 8*s.* or 4*s.*, and whether they are to pay 12*s.* costs or 6*s.* But that alone is a sufficient objection. A party has a right to know precisely the amount of penalty imposed upon him, in order that he may be able to relieve himself. And, besides, this is clearly a several offence, and the magistrates are bound to consider the conduct of the parties respectively in imposing the fine. The defend-

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ants would make the right to fine commensurate with the power; but they have no right to impose a fine unless they are satisfied that it is the proper one. And, on a conviction like this, the magistrates may have intended one party to pay a fine little more than nominal, and the other a more considerable one; yet the first might be imprisoned till the latter had paid his fine. It is laid down in the passage of *Hawkins*, already referred to, that a judgment having this effect would be erroneous. The rule must be discharged.

LITTLEDALE J. The party informing in this case might have proceeded against the plaintiff and *Parker* jointly or severally, either by action or criminally. The proceeding is instituted under stat. 9 *G.* 4. *c.* 31.: the magistrates hear the complaint, and decide that 4*s.* be paid as a fine, and 6*s.* for costs, and that the parties be imprisoned fourteen days, unless the fine and costs be sooner paid. It is not certain, upon the face of the conviction, whether the magistrates intended that each defendant should pay 4*s.*, or that that sum should be paid between them; but, upon the whole, I think it must be taken to mean that one fine of 4*s.* should be paid. Then, supposing the case were that of an indictment against two persons, could there be a judgment against them jointly, that they should pay a fine? It is the constant practice in this Court, on judgment against several parties, where a fine is imposed, that the case of each is considered separately. By the stat. 9 *G.* 4. *c.* 31. *s.* 28. a summary conviction of assault, under that act, is made a bar to any further criminal proceeding. The conviction, therefore, stands in the place of an indictment; and the officers of the Court say that, on indictment, there

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there is no instance of a joint fine upon two persons for an assault. In *Godfrey's* case (*a*), referred to in the margin of the passage of *Hawkins* which has been cited, it is said (*b*) that when a fine is imposed against law, as joint, where it should be several, it may be avoided by plea and judgment of the Court. And so in this case, the adjudication of a joint fine, being brought before the Court, may be declared invalid, as well as if the question had been raised by plea. The general result of the authorities cited in *Hawkins*, I think, is that, where a fine is imposed upon several defendants, it should be imposed upon them separately. And therefore, upon those authorities, as well as on the grounds of reason and the practice of the Court, I am of opinion that there should, in this case, have been separate fines, and that the conviction was bad, not in form but in substance.

WILLIAMS J. concurred (*c*).

Rule discharged.

(*a*) 11 *Rep.* 42. *a.* (*b*) Page 44 *b.*

(*c*) *Coleridge* J. was absent. See p. 489., antè.

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Tuesday, January 19th.

JOHNSON *against* The Churchwardens and Overseers of the Parish of ST. PETER, HEREFORD.

A. demised to *B.*, for a term of years, two messuages; the lease contained a covenant by *B.*, that he would, during the term, keep the premises in repair, and leave them, at the end of the term, in good repair and in the same state as they were in at the beginning. At the end of the term, the messuages were out of repair, and had been converted into a single house. *B.* held on without a fresh lease, and *C.* afterwards purchased the reversion of *A.*, and *B.* continued to hold on under *C.*: Held,

1. That *B.* was not liable in assumpsit on an implied contract to put the messuages in such repair, and in the same state, as they were in at the commencement of the term.

2. That, supposing *B.* so liable, *C.* had no right of action for breaches of the contract committed before he purchased the reversion.

ON the trial of this cause at the *Hereford* Summer assizes, 1834, before *Alderson* B., a verdict was taken for the plaintiff, with 500*l.* damages, subject to the award of a barrister, who was to state on the face of his award any question of law which he might be requested to raise, either as to the right of the plaintiff to recover, or as to the principle on which the damages, if any, were to be settled. The arbitrator found specially as follows: —

I find that, by an indenture of lease, bearing date 15th of *December* 1807, *Harcourt Woakes* demised two messuages to *Francis Gritton* and *William George*, churchwardens, and *Thomas Day*, overseer, of the poor of the parish of *St. Peter* in *Hereford*, and to their successors, for the term of twenty-one years from the 25th of *December* then next, at the yearly rent of 16*l.* 16*s.* payable at *Midsummer* and *Christmas*. This lease contained the following covenant by *Gritton*, *George*, and *Day*, for themselves and their successors, churchwardens and overseers of the parish of *St. Peter* for the time being: that they the said *F. G.*, *W. G.*, and *T. D.*, and their successors, churchwardens and overseers, &c., shall and will from time to time, and at all times during the said term, at their own costs

and

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and charges, keep in good and tenantable repair the said messuages or dwelling houses hereby demised, and, at the end or sooner determination of the said term, shall and will quit and leave the said premises and every part thereof in such good and tenantable repair and also they the said *F. G.*, *W. G.*, and *T. D.*, churchwardens, &c., shall and will use and keep the same, and every part thereof, as and for a workhouse or house of industry for the use of the said parish of *St. Peter*, or for such other uses and purposes as they may think proper to convert the same, provided the said premises and every part thereof are left in the same state and condition as they are at present, at the end of the said term. The premises were occupied by the parish of *St. Peter* under this lease, until its expiration on the 25th of *December* 1828, the two messuages having been converted into one poor-house, and continuing in that state on the 25th of *December*. Possession of the premises was not given up at that time; but they continued to be occupied as the parish poor house; and the rent of 16*l.* 16*s.* per annum was paid by the parish officers for the time being until the 2d of *February* 1833, when possession was given up, after notice to quit served by the churchwardens and overseers upon the plaintiff; but the premises were not re-converted into two distinct tenements.

I find that the interest of *Harcourt Woakes* in the premises had, at the time when the lease expired, become vested in one *John Henderson*, who afterwards conveyed the same to the plaintiff by lease and release of 9th and 10th of *February* 1829. The rent payable by the parish for these premises was then apportioned, and a part paid over to Mr. *Henderson*; from which

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JOHNSON *against* The Churchwardens of ST. PETER, HEREFORD.

time the rent-days were altered from *Christmas* and *Midsummer* to the 2d of *February* and the 2d of *August*. I find that the above covenant to repair was broken by the said *Gritton*, *George*, and *Day*, at the expiration of the said lease, and the dilapidations amounted to the sum of 53*l.*; and I find that that amount of dilapidations still continued at the time when the possession was given up, on the 2d of *February* 1833, but no more. And I find that the covenant for the leaving of the premises in the same state and condition as at the time of the demise was also broken at the expiration of the lease, if the Court shall be of opinion that the non-conversion of the workhouse into two distinct tenements constituted a breach thereof. If the defendants are to be considered as holding after the determination of the lease upon the terms of tenants from year to year simply, then I find that they fully repaired the premises during the whole of such their yearly tenancy, as far as such tenants are liable. If they are to be considered as holding subject to the same terms as were contained in the above lease, then, as to the amount of dilapidations, I do not find any thing to be due beyond the above mentioned sum of 53*l.*, which was so due, as already stated, on the 25th of *December* 1828, and still continued due on the 2d of *February* 1833, the dilapidations being the same at both periods; but I find that the re-conversion of the poor house into two houses, in the same state and condition as at the original demise, would have cost the sum of 5*l.*

The declaration consisted of three counts. The first stated that, in consideration that the defendants had become tenants to the plaintiff of certain premises that had before then consisted of two separate messuages, but which

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which had been altered and converted into a workhouse, and so continued and remained at the time of making the promise after mentioned, upon certain terms and conditions, that is to say, that the defendants would during the continuance of the said tenancy keep the said premises in good and tenantable repair, and, at the expiration of the said tenancy, re-alter and re-convert the said workhouse in two separate houses, and restore the said premises to the same state and condition in which they were previous to their alteration and conversion, and deliver them up in such good and tenantable repair, the defendants promised so to do: the plaintiff then alleged that the tenancy continued for a long space of time, until the defendants quitted and delivered up possession; and he stated, as a breach, that the defendants did not keep the said premises in good and tenantable repair, nor re-alter or re-convert the said workhouse into two separate messuages, or restore the said premises to their former state and condition. The second count was confined to the non-repair, and alleged that the defendants held the premises upon terms and conditions similar to those contained in the covenant of *Gritton*, *George*, and *Day*. The third count was the common count for not keeping in good and tenantable repair. The defendants pleaded the general issue.

Upon the above statement of facts, I award that the verdict now entered for the plaintiff shall be set aside, and a verdict be entered for the defendants, unless the Court shall be of opinion that the plaintiff is entitled to recover the said several sums of *53l.* and *5l.*, or either of them; and according to such decision I award that the said verdict shall be reduced to the sum of *58l.*, *53l.*, or *5l.*, with forty shillings costs.

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JOHNSON *against* The Churchwardens of ST. PETER, HEREFORD.

In *Michaelmas* term 1834, *Maule* obtained a rule to shew cause why the verdict and judgment should not be entered for the plaintiffs for 53*l*., or 5*l*., or both sums, and the award be set aside.

Talfourd Serjt. and *Godson* now shewed cause (*a*).

The arbitrator has found properly. Both plaintiff and defendants are strangers to these covenants. The plaintiff purchased after the lease had expired, and the covenant had been broken; he took the premises as they were at the time of the sale to him; but he could not purchase a right of suing for past breaches. And the price which he paid must have been estimated upon this principle. Again, the defendants came into possession after the lease had expired, and after the covenants had been broken: they could not be understood as accepting a demise subject to previous dilapidations. The policy of the poor laws is, that each year shall bear its own burthen. When the lease was entered into, in 1807, the stat 59 *G.* 3. *c.* 12. had not passed; the parties then taking had, therefore, no power, such as that given in *s.* 17., to take in succession. It is true that, in the common case of a lessee holding on after the expiration of his lease, an agreement to continue holding upon the terms of the lease may be implied: but here the implication cannot arise, because the occupiers are no longer the same. And the particular covenants, to deliver up at the end of the term, in good repair, and to re-convert the houses at the end of the term into their former state, cannot have been contemplated by parties taking after the term had expired.

(*a*) Before Lord *Denman* C. J., *Littledale*, and *Williams*, Js.

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Maule and *R. V. Richards* contrà. The argument, that the plaintiff had no right to sue for these breaches, assumes that the original lessor had no right to sue upon the contract arising after the expiration of the lease. If the latter could sue, the assignee of the reversion could sue. He has as much right to enforce the implied agreement, as an assignee of the original lease would have had to enforce the covenants. Then, as to the defendants, on what terms did they hold? None can be implied, except those contained in the leases, subject to the express variations as to the days of payment. This was laid down by Lord *Ellenborough* in *Digby* v. *Atkinson* (*a*). It is said that this construction will be contrary to the policy of the poor laws; but, if the parish officers are allowed to hold by a lease, they must be subject to the contract to repair contained in the lease. The original lessees were trustees for the parish; if so, the case falls within stat. 59 *G.* 3. *c.* 12. *s.* 17. upon the authority of *Doe. dem. Jackson* v. *Hiley* (*b*). [Lord *Denman* C. J. In *Digby* v. *Atkinson* (*a*) it was not put to the Court that the terms on which the holding on took place were a question for the jury. Must not the question be one of fact? If so, are you not bound by the arbitrator's finding?] As a presumption of fact, the arbitrator may leave it to the Court, as is often done in cases sent from quarter sessions. But it is is rather a presumption of law. [*Littledale* J. If Lord *Ellenborough* lays it down as a conclusion of law, I think he goes too far. I always understood it to be a fact which was inferred, unless the state of things

(*a*) 4 *Campb.* 275. (*b*) 10 *B.* & *C.* 885.

was

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was altered at the expiration of the lease. But, if it is an inference of law, the covenants in a lease which had expired a hundred years ago might be enforced, though there had been repeated changes of tenants.]

Cur. adv. vult.

Lord DENMAN C. J. in this term (*January* 30th), delivered the judgment of the Court. After stating the facts, his Lordship proceeded as follows.

The plaintiff relied on the general principle, that, where premises are held on by the same tenant of the same landlord, after the expiration of a lease of them, granted to the former by the latter, without a new contract, the law will imply an agreement to hold on the same terms. He cited the case of *Digby* v. *Atkinson* (*a*), where a party so continuing, having been originally bound by his covenant to keep in repair, was held liable to make good a loss by accidental fire. That case would have been applicable, if the fire had happened during the term. But if it had, the plaintiff could only have had an action of covenant upon his lease, not assumpsit on the breach of an implied contract arising out of a new tenancy from year to year, when the defendant became tenant of premises in that very condition which he is supposed to have undertaken that they should never fall into.

The change of parties produces another difficulty. The defendants were and are clearly liable to their original lessor on their breach of covenant. How then can they be also liable to their new landlord for the

(*a*) 4 *Campb.* 275.

same

same damage arising from the breach of their implied undertaking? This would be manifestly unjust. But there is no injustice in confining the remedy to that party with whom the covenant was broken, who has either sold the premises for a lower price for that reason, or has received the full price on the supposition that the damage is to be made good. In the former case he may sue on his own account; in the latter, as trustee for his vendee.

Something was said on the alteration of the law relating to churchwardens: but we do not think it could affect the present question, as the former lease, to whatever extent it may be binding, is not the actual contract, but only evidence of the contract that came into existence at its termination.

Verdict to be entered for the defendants. (*a*)

(*a*) See *Duckworth* v. *Simpson*, 1 *C. M. & R.* 834. *S. C.* 5 *Tyrw.* 344.

Tuesday, January 21st.

JOHN SEATON, HENRY EDWARDS, and HESTER his Wife, and MARY SEATON, *against* JAMES BOOTH.

A., *B.*, and *C.*, being interested in certain lands, but having no common legal interest in any portion of them, agreed together to put them up for sale, according to their respective interests, and the lands were so put up, under the direction of their agent, in lots. Each lot was described in a separate paper, containing the conditions of sale, in which it was stipulated that "the vendors" should deliver an abstract of title; that the conveyances should be executed, and the whole purchase money paid, on a certain day, from which time the purchaser should have possession; and that, if the purchaser should be let in before payment of the purchase money, he should be considered tenant at will to the vendors, and pay interest at the rate of 4 per cent. on the amount of purchase money, as and for rent. Defendant bought four of the lots under the above conditions, two by auction, and two by private contract. No abstract of title was delivered; but defendant was let into possession, and held for several years, not paying the purchase money. He knew of the arrangement entered into by *A.*, *B.*, and *C.* for the sale of the premises:

Held, that *A.*, *B.*, and *C.* could not jointly sue upon an implied contract by the defendant to waive the delivery of an abstract, and perform the condition for payment of 4 per cent. interest as rent.

Also, that *A.*, *B.*, and *C.* could not recover the 4 per cent. in a joint action for use and occupation.

ASSUMPSIT. The first count of the declaration stated that, before the making of the promise &c., the plaintiffs caused to be put up to sale certain premises of *Gervas Seaton* deceased, to wit (describing several parcels of land), upon and subject to the following conditions, viz.: That the vendors should, at their own expense, make out and deliver an abstract of the title to every purchaser whose purchase money should amount to 200*l.* or upwards, on or before the 7th of *March* then next, and lodge a general abstract of the title to the whole estate at the *Whitgift* Ferry House, there to remain for the use and inspection of all the other purchasers: That the vendors should deliver to the said defendant (*a*) a copy of the deed vesting the estate in themselves or their ancestors, and the purchaser should be at the expense of the conveyances, and of all further copies of deeds which he might re-

(*a*) The words of the condition itself were, "the vendors shall deliver a copy of the deed vesting" &c.

quire:

quire: That the conveyances should be executed, and the remainder of the purchase money paid, on the 6th of *April* then next, from which time the purchaser should have possession or be entitled to the rent; but, in case he should be let into possession before the payment of his purchase money, he should be considered as tenant at will to the vendors, and pay interest after the rate of 4*l.* per cent. per annum upon the amount of his purchase money, as and for such rent (*a*). The count then stated that the plaintiffs, on &c., at the request of the defendant, bargained, &c., and the defendant bought of the plaintiffs, the above-mentioned premises, upon the said conditions, for a certain price, viz., &c. And whereas afterwards, and before the making of the promise &c., the plaintiffs had neglected and omitted to make out and deliver to the defendant an abstract of the title to the last-mentioned premises, and to lodge a general abstract &c. (as in the conditions above set out), and had also neglected and omitted to deliver to the defendant a copy of the deed vesting the estate in themselves or their ancestors, in consideration of the premises, and that the plaintiffs, on &c., would permit the defendant to have possession of the premises so bargained and sold to him as aforesaid, the defendant undertook and promised the plaintiffs that he would waive the said several omissions and neglects, and would abide by and perform the last-mentioned condition of sale, for the payment of interest at four per cent. &c. as and for rent, as if no such neglect or omission had been made. Averment that the plaintiffs

(*a*) The words of the condition were "as and for rent."

always,

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always, from the time of the exposure to sale, &c., have been ready and willing to perform all things in the said agreement, &c.: that they, on *April* 6th 1828, permitted the defendant to have possession of the premises: that he then entered into possession, and from thence continually has remained in possession, &c.: and that the interest from the said 6th of *April* till the commencement of the suit amounted to &c. Breach, non-payment. The second count was for use and occupation. Plea, the general issue.

On the trial before Lord *Lyndhurst* C. B. at the *York* Summer assizes 1834, the following facts appeared. By the will of *Gervas Seaton* deceased, certain premises, of which those in question formed part, were devised to the plaintiff *John* in fee, in trust to make certain allotments out of them to the plaintiffs *Hester* and *Mary*, and, subject to such trust, to his own use in fee. It did not directly appear whether or not the allotments had been made at the time of the sale. The estates comprising the premises now in question were put up to sale by auction in lots. Each lot was described on a separate paper, headed, "Upon sale by auction, at the *Whitgift* Ferry House, this 4th of *February* 1828, the estates of the late Mr. *Seaton*, in lots." Then came the description of the lot; and below were printed the conditions of sale. The defendant bought lots 13 and 14 at the auction, by separate biddings, subject to the conditions of sale recited in the declaration; and he signed the conditions. The condition for executing the conveyance, &c., on the 6th of *April*, and for payment of 4 per cent. if the purchaser should be let in before payment of the purchase money, was

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No. 8. The defendant bought two other lots, separately, by private contract, also subject to the conditions mentioned in the declaration. No other express contract was at any time entered into by him. The plaintiffs had executed a deed of covenant among themselves, according to their respective interests, for the purpose of authorising the sale and regulating the distribution of the proceeds. The draft was prepared by Mr. *Pearson*, a solicitor; and the terms of it were known to the defendant. *Pearson* managed the sale, as attorney for the vendors. The defendant was let into possession of the above mentioned four lots, being the premises mentioned in the declaration, and had kept possession of them ever since, without paying interest or rent. No abstract had been delivered or lodged, according to the conditions. *F. Pollock*, for the defendant, objected, first, that the first count of the declaration stated one sale of all the premises, whereas it appeared by the evidence that there were several distinct sales; and, secondly, that the alleged agreement to waive the non-delivery of an abstract, and to pay 4 per cent. on the purchase money, had not, either expressly or impliedly, been made between the defendant and the plaintiffs jointly. He also contended that the plaintiffs could not, under the circumstances, recover on the count for use and occupation. The Lord Chief Baron held the first count not maintainable, and a verdict was taken for the defendant on that count, and for the plaintiffs on the second, leave being reserved for the defendant to move to enter a nonsuit. A rule nisi was obtained for that purpose in the ensuing term (*a*).

(*a*) One ground of the motion was the joinder of *Hester Edwards* as a plaintiff, but no decision was given as to this.

Alexander

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Alexander and *Wightman* now shewed cause. First, as to the special count. In *James* v. *Shore* (*a*), which was cited for the defendant at the trial, two lots had been sold separately, and the purchase was stated in the declaration as if the contract had been for both lots jointly; and this was held a variance. But there the action was brought to enforce the very contract so misstated. Here, the contract for purchase of the lots on certain conditions is merely matter of inducement: the ground of action is the non-performance of a subsequent contract, namely, to abide by the eighth condition of sale notwithstanding the non-delivery of an abstract. The case, therefore, does not apply. Then as to the count for use and occupation. By the eighth condition the defendant, upon being let in, was to hold as "tenant at will to the vendors, and pay interest after the rate of 4 per cent. per annum upon the amount of his purchase-money, as and for rent." He was let in under that condition. That was clearly a holding under an "agreement," "whereon a certain rent was reserved," within stat. 11 *G.* 2. *c.* 19. *s.* 14. *Hull* v. *Vaughan* (*b*), which is a stronger case than this, and *The Dean and Chapter of Rochester* v. *Pierce* (*c*), shew that, in general, ownership on one side, and a permitted occupation on the other, are sufficient ground for an action for use and occupation. *Saunders* v. *Musgrave* (*d*), where it was held that the purchaser was liable as for rent, resembles this case. In *Kirtland* v. *Pounsett* (*e*), which may be cited on the other side, and where use and occupation

(*a*) 1 *Stark. N. P. C.* 426.
(*b*) 6 *Price*, 157. *Peake N. P. C.* 254. note (*a*). 3d ed.
(*c*) 1 *Camp.* 466. (*d*) 6 *B.* & *C.* 524.
(*e*) 2 *Taunt.* 145.

was

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was held not to lie, the purchaser (the defendant) had paid his purchase-money, and the plaintiff had had the use of it during the time of the occupation: and the defendant had not had an occupation which could properly be called beneficial, as the holding in this case was. It will be contended that the evidence in this case does not shew any contract with the plaintiffs jointly. But in the conditions of sale no person is named: the contract is with the vendors, whoever they may be. The defendant was to be "tenant at will to the vendors." It does not appear that there had been any partition among the plaintiffs. *John Seaton* and *Hester* and *Mary Seaton*, though not joint tenants, had each an interest in the whole of the lots, and they had united in putting them up to sale, and in allowing the defendant to have possession. Suppose the agreement had been that the defendant should hold as tenant at will to the devisees of *Gervas Seaton*, or that the premises should be considered as let to the defendant for those whom it might concern; the case would not have differed materially from this, and the plaintiffs, jointly, would have been the proper parties to sue.

Sir *F. Pollock* (with whom was *Joseph Addison*), contrà. As to the special count, the transaction there stated was, in fact, several contracts for the purchase of different lots, upon the conditions stated in the count. If that transaction was to be dismissed as mere matter of inducement, the plaintiffs ought to have shewn some subsequent contract upon the terms of the eighth condition, embracing all the lots. None such is proved. As to the claim for use and occupation, the fact of a party being let into possession upon an agreement of

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purchase does not of itself shew a contract upon which such a claim could arise. The eighth condition, if it could be resorted to under this count, would not establish a tenancy; it was a special contract for the payment of certain interest on the purchase-money, in a particular event. *Saunders* v. *Musgrave* (*a*) was a very different case, and is no authority for the plaintiffs. In the present instance no contract for use and occupation could arise between the defendant and the plaintiffs in respect of any one portion of the premises. They had no common interest in any part. To support an action for use and occupation there must be either an occupation by the defendant and title proved in the plaintiffs, which is not the case here; or an actual contract, of which there is no evidence. The word "vendors" in the conditions of sale was used to avoid specifying parties; it does not enable the plaintiffs to claim as landlords if not otherwise entitled.

Lord DENMAN C. J. This case turns entirely upon the question, whether or not the plaintiffs have jointly made any contract with the defendant. Putting out of view any point arising upon the interest of *Hester Edwards*, the matter for consideration is, first, whether the several persons claiming to stand in the situation of landlords of these premises have agreed to become vendors of them to such persons as might become purchasers. There is no evidence of any joint contract to this effect. Then it is said that the agreement of sale, as stated in the declaration, is merely inducement. But there is no subsequent contract proved. The under-

(*a*) 6 *B.* & *C.* 524.

taking

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taking relied upon must result either from the original contract of sale, or from a joint ownership in the plaintiffs and occupation under them. But the contract proved does not support the action, and there is no joint-ownership proved. The plaintiffs, therefore, cannot recover.

LITTLEDALE J. The declaration states a contract between the plaintiffs and the defendant for the sale and purchase of the premises; and that, in consideration of being let into possession, the defendant agreed to waive the non-fulfilment by the plaintiffs of a part of the conditions, and to perform the eighth condition of sale for the payment of four per cent. interest as and for rent, as if no such omission by the plaintiffs had occurred. But the evidence did not shew an express contract to that effect, made by the defendant with all the plaintiffs; and no such contract could be implied, at law, from the mere circumstance of the defendant being let into possession. The remedy was to be sought in equity. As to the count for use and occupation, the eighth condition, under which the defendant is said to have occupied, supposes that the vendors shall have performed their part of the previous contract, and provides for the case of default made by the purchaser, after such performance. The law would not imply that the vendee had subjected himself to such a condition by being let into possession while the title remained uncertain. And supposing that the defendant, under the circumstances, had agreed to be bound by the eighth condition, the action ought not to have been for use and occupation: the declaration should have been special on the contract to pay four per cent.

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upon the purchase money; a contract in the nature of an agreement for a tenancy, but not amounting to that. As *Eyre* C. J. observes in *Naish* v. *Tatlock* (*a*), "the statute" (11 *G.* 2. *c.* 19. *s.* 14.) "meant to provide an easy remedy in the simple case of actual occupation, leaving other more complicated cases to their ordinary remedy."

WILLIAMS J. concurred.

COLERIDGE J. As to the special count, it is enough to say that there was no evidence from which the jury could infer such a contract as is there stated; though I do not mean that circumstances might not have arisen from which that contract might have been implied. But then it is contended that the parties may have an action for use and occupation, because the defendant has come in under a contract of sale to which they, as vendors, are one entire party, and has had a beneficial occupation under it. Whether there was a beneficial occupation, upon which such an action might be grounded, it is not necessary to examine; and perhaps it may not be easy to reconcile the cases upon this subject, each of which has turned very much on its own particular circumstances. But, assuming that there was such an occupation, what is the evidence of a permission to occupy, given by these four plaintiffs? It must be inferred, either from the interest of the four plaintiffs in the premises, or from some contract entered into (though not perhaps expressly) by them. Now there is clearly no joint title. And the defendant's undertaking to purchase was by separate agreements as to the different

(*a*) 2 *H. B.* 323.

lots:

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lots: at least the purchase by private contract was distinct from the purchase under the sale by auction. Then, the contracts of purchase being separate, how can we infer from the terms of them one entire contract after the purchase, relating to all the property? The defendant was let in under the eighth condition. But that is a special contract; and it is contained in four several sets of conditions, annexed to the descriptions of the different lots. And, although it is said that the defendant came in under "the vendors," the contract with the vendors must be looked at with reference to the title of the parties for whom the sale is made. The plaintiffs have, therefore, failed to establish either an express or an implied contract.

Rule absolute.

Saturday, January 23d.

The KING *against* LANGHORN.

To a quo warranto for exercising the office of mayor of a borough, the defendant pleaded that by charter the corporation had power to elect a burgess for mayor; and that, by custom, there was an indefinite number of free burgesses, and the mayor, bailiffs, and burgesses, being duly assembled, might elect whom they would for burgess; that he was elected burgess at a meeting duly assembled, according to the custom of the borough, and was afterwards duly elected mayor according to the charter. The Crown traversed the fact that the meeting at which he was made a burgess was duly assembled. It appeared, at the trial, that the meeting was not held on a day appropriated to the purpose of electing burgesses; and the jury found that the custom was to elect burgesses by the burgesses for the time being, who were indefinite in number; and that every resident burgess was to be served with a personal notice of the meeting, and, if he required it, of its object; but that the custom must be taken with the qualification that an accidental omission to serve a resident burgess was not a violation of it. It also appeared that *R.*, a resident burgess, had told the officer whose duty it was to serve the notices, that he need not serve him, as he was frequently absent, and could hear tell of what was going on. The officer did not serve *R.*, who was in fact in the borough at the time of the meeting. The jury found expressly that the omission to serve *R.* was accidental:

Held, that the qualification of the custom, as to accidental omissions, was bad in law; and that the omission to serve *R.* was not accidental.

INFORMATION in the nature of a quo warranto, for exercising the office of Mayor of the borough of *Berwick-upon-Tweed.*

The first three pleas alleged that the Mayor, by charter, was to be elected according to a method specified in the pleas, from the burgesses. They set out three different customary methods of electing a burgess, and alleged that the defendant was duly elected burgess in conformity with such customary methods respectively, and was afterwards duly elected mayor, according to the charter. The Crown took issue on the fact of the election as burgess in conformity with the method alleged in the first plea; and to the second and third pleas replied specially a customary method of electing burgesses, different from the method alleged in those pleas, with special traverses of the methods therein alleged; and the replication also took issue on the fact of the election in conformity with each method alleged in the second and third pleas respectively. The defendant joined on the issues tendered by the Crown; and also took issue on the special traverses of the customary methods respectively

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spectively set out in the second and third pleas; on which issues the Crown joined.

The fourth plea admitted the constitution of the borough, and the nature of the office of mayor, as laid in the information; and alleged that, by the governing charter (2 *Ja.* 1.), the mayor, bailiffs, and burgesses were empowered to meet on *Michaelmas* day, and nominate and elect one of themselves to be mayor for the year ensuing; that, long before and at the time of granting the charter, there had been and still was an indefinite number of free burgesses, and that there had been during all that time, and still was, a custom for the mayor, bailiffs, and burgesses, for the time being, being duly assembled at a guild or meeting for that purpose, to elect and choose such person or persons to be a burgess or burgesses, as the said mayor, bailiffs, and burgesses, so assembled, or the greater part of them, should think fit, and for the person so chosen, being first duly sworn, to become and be a burgess; that, during the continuance of the custom, to wit, on *March* 23d, 1831, the then mayor, bailiffs, and greater part of the burgesses, then and there duly assembled at a guild or meeting of the mayor, bailiffs, and burgesses, for that purpose, after due notice in that behalf of such guild being given to the burgesses, duly elected and chose the defendant to be a burgess; that he was afterwards duly sworn (*March* 29th, 1831); that from thence hitherto he had been and still was a free burgess of the borough; that, whilst he was such burgess, to wit, on the feast of *St. Michael the Archangel*, 1831, the then mayor, bailiff, and burgesses, assembled and met, according to the terms of the charter, for the purpose

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of electing a mayor, and, being so assembled, nominated and elected the defendant for the year next ensuing; that he took all the requisite oaths; and from thence continually till *September* 29th, 1832, was mayor; and by that warrant, &c.; without this, that &c.; verification. Replication, that the mayor, bailiffs, and burgesses did not duly assemble at a guild or meeting of the mayor, bailiffs, and burgesses, for the purpose of electing and choosing a burgess or burgesses in manner, &c.; conclusion to the country. Joinder.

On the trial before Lord *Lyndhurst* C. B., at the *Northumberland* Summer assizes 1834, evidence was given, on the part of the Crown, to shew that there was no particular day, by charter or custom, appropriated to the election of burgesses; that, previously to meetings for that purpose, notice was given by ringing a bell three times, namely, for a quarter of an hour, two hours before the guild is held, and again, for a quarter of an hour, one hour and a half before the guild is held, and again, by ringing the bell at the time appointed for the meeting of the guild, the ringing of the bell being loud enough to be heard over all the borough: and also by a serjeant at mace giving notice personally to the resident burgesses, or leaving word at their places of residence, of the intended meeting, and, if required, of the purpose for which it was to be held. It appeared also, in fact, that two resident burgesses of the name of *Robertson* (a fisherman) and *Mace* did not receive such notice, and did not attend. The serjeant at mace gave evidence that *Robertson* had several times, before the meeting, told him not to summon him, as he was frequently out at sea, and

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as he could hear tell of what was going on (*a*): and that he had accordingly not served him; and that he had omitted to serve *Mace* accidentally. *Robertson* stated that he had never used the expressions sworn to by the serjeant at mace, and that he was in the borough at the time of the election. The jury found that the custom was as pleaded by the defendant in the second plea: and, on the issue upon the fourth plea, they found for the defendant, stating that they were of opinion that the custom was to give notice by ringing the bell three times, and also by serving every resident burgess with notice of the meeting, and of its purpose, if the burgess required to know the purpose; but that the custom was to be taken with the qualification, that it was not violated by an accidental omission to serve the notice upon any individual burgess (*b*); and that the omission, in the case of *Robertson* and *Mace*, was accidental. The other issues were found for the Crown. It was agreed that the reasons assigned by the jury should be considered as a special finding; and leave was given to move to enter a verdict for the Crown on the issues found for the defendant. In *Michaelmas* term 1834, *Atcherley* Serjt. obtained a rule to enter such verdict, or for a new trial, on the grounds that the service, and notice of the purpose of the meeting, were necessary by law in the case of every resident

(*a*) According to one note of the evidence, the words deposed to were "that he could hear the bell," not "that he could hear tell of what was going on."

(*b*) This custom, omitting the qualification, was the custom pleaded in the second plea, and affirmed by the verdict on that plea; and it was at first insisted in argument, that the finding on the second plea was inconsistent with the finding of the qualified custom on the fourth plea; but this point was not ultimately pressed.

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burgess; and also that the finding that the omission was accidental was against the evidence. Other grounds were also suggested; but the judgment of the Court renders them immaterial. The arguments on the issue as to the custom pleaded in the second plea are also rendered immaterial by the judgment of the Court, and by the issues which were found for the Crown.

Sir *F. Pollock*, *Cresswell*, *Ingham*, and *Wightman*, now shewed cause. The first question is, whether the custom, as found by the jury, and with the qualification which they have incorporated into it, be necessarily a bad custom: the second is, whether it has been complied with. The first question alone can have any reference to the motion for entering a verdict for the crown on the last issue found for the defendant; the second question would merely relate to the motion for a new trial, which would be granted only on payment of costs. As to the first, it cannot be necessary that notice should in every case be given to every voter. Persons not summoned might in fact attend and concur in the election, which is enough to shew that there may be a lawful assembly without notice being given to every single elector; *Rex* v. *Chetwynd* (*a*), *Rex* v. *Theodorick* (*b*). Therefore the qualification of the custom is not necessarily inconsistent with law. Indeed a custom to serve, under all circumstances whatever, a personal notice on every elector, would be a custom requiring what, in the great majority of cases, would be impossible. As to the second question, there was evidence to support the finding of the jury. With respect to *Mace*, the jury

(*a*) 7 *B.* & *C.* 695.

(*b*) 8 *East*, 543. See *Musgrave* v. *Nevinson*, 2 *Ld. Raym.* 1358.

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could not, on the evidence, find otherwise. As to *Robertson*, he had a right to waive his claim to a notice. [Lord *Denman*, C. J. Is it not a duty in every elector to attend? How then can he make such a waiver?] There may be a difference, as to this, between a select and an indefinite body. Where every corporator has an equal voice, as in the present case, each vote expresses only the will of the individual, no one representing any interests but his own; the attendance, therefore, is a mere personal privilege, which may be waived. But, where the body is select and definite, each member is entrusted with the duty of deciding for others; and this is a delegated power which he cannot renounce. Again, in the case of a definite body, no valid act can be done unless a majority of the entire number be present; but the acts of an indefinite body are valid, if done by the majority of the persons present, however small a fraction that may be of the body at large. In the latter case, therefore, as the absence of an individual is less important, the service of notice is of less consequence. Again, the waiver here was, not of the right of attendance, but of the ceremony of notice, which is only for the convenience of the burgess; in spite of that waiver, the burgess may mean to attend, taking on himself the burthen of watching for the meetings. Again, after the serjeant had understood that *Robertson* was likely not to be in the borough, his omission to serve him was a mere accident, arising from incorrect information. Suppose a burgess were to tell the serjeant at mace that he should be certain to hear the bell, or to hear of the notice from his neighbours, and that therefore the serjeant need not give him personal notice: could it be said,

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said, that an omission accordingly made by the serjeant was otherwise than bonâ fide and accidental?

Atcherley Serjt., and *Coltman*, contrà. First, as this election did not take place on a day appropriated to the purpose, there ought to have been notice to every resident elector of the meeting, and of its object; and the omission to summon one vitiates the meeting; *Rex* v. *The Mayor of Shrewsbury* (*a*), *Rex* v. *Hill* (*b*), *Rex* v. *Tucker* (*c*), *Rex* v. *Mayor of Liverpool* (*d*), *Rex* v. *Mayor of Doncaster* (*e*). It is true that it was held, in *Rex* v. *Chetwynd* (*g*), that if all the electors be present, and concur, the want of notice is immaterial. Here, however, two electors, who were not summoned, did not attend. Besides, *Rex* v. *Chetwynd* (*g*) was the case of a select body. But in *Rex* v. *Hill* (*b*), where the election was by the body at large, notice of the object of the meeting was held requisite; and this distinction is expressly relied upon by Lord *Tenterden*, in *Rex* v. *Pulsford* (*h*). If an accidental omission of one do not vitiate the election, an accidental omission of all would not: yet, if a custom were pleaded, that notice to all might be omitted provided this happened by accident, such a custom would unquestionably be bad on the face of it. The jury, it is true, have found the custom, as qualified; but if such a qualification be illegal, or not pertinent, their finding must be disregarded; *Priddle and Napper's Case* (*i*), *Townsend's Case* (*k*). Again, supposing

(*a*) *Ca. K. B. Temp. Hardw.* 147. *S. C.* 2 *Str.* 1051., as *Kynaston* v. *The Mayor of Shrewsbury.*
(*b*) 4 *B. & C.* 426.
(*c*) 1 *Barnard, K. B.* 26.
(*d*) 2 *Burr.* 723.
(*e*) 2 *Burr.* 738.
(*g*) 7 *B. & C.* 695.
(*h*) 8 *B. & C.* 354.
(*i*) 11 *Rep.* 10 *b*, 13 *a.*
(*k*) *Plowd.* 114.

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the qualified custom to be good, it has not been pursued in fact. If there be a customary method of notice, other than that which ordinarily prevails, it must be strictly followed; *Rex* v. *May* (*a*). Here the serjeant at mace intentionally omitted to serve *Robertson* with notice; that was the evidence of the defendant's witness, which must conclude him; and the jury by their finding mean no more than that the omission was not from any corrupt or fraudulent motive. Neither can this omission be made good on the ground of *Robertson*'s waiver; for *Robertson* had no power to waive a summons by which he was to be called on to perform a duty. If one burgess might waive, all might; and then there would be an election without notice at all. (*Hoggins* on the same side was stopped by the Court).

Lord DENMAN C. J. It is perfectly clear to me that the verdict must be entered for the Crown, on the last issue found for the defendant. The question is, whether the meeting was duly assembled. The jury find that it was, subject to the question whether such finding be warranted by facts which they also find. Those facts are, that the custom is for all resident burgesses to receive a personal summons; and that the resident burgesses did not receive such summons. The jury give their opinion that the custom stated ought to be received with the qualification, that an omission by accident does not vitiate; that is, that a custom to summon all, means a custom to summon all, subject to accident. If so, the verdict ought to stand for the defendant. But I think that that is not so; and that an accidental omission does not excuse the officer. If it

(*a*) 5 *Burr.* 2681.

did,

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did, I fear that accidental omissions would soon become intentional ones. Besides this, one omission was not accidental. It was made, merely because the burgess told the officer not to summon him, as he was generally away from home. It is clear from authority and principle that this furnished no excuse for the officer's omitting to summon the burgess. The reason has been properly assigned at the bar, namely, that attendance was a public duty on the part of the burgess: and this was admitted, on the other side, to be true in the case of a select body; but it was argued that, in the case of an indefinite body, the rule was different. That is a distinction to which I cannot assent. The public have a right to the security arising from the service of notice; and nothing but actual impossibility will cure the omission. I come to this conclusion with great regret, because much inconvenience may be produced with respect to titles affected by the omission. This, however, must always follow where a party is unduly placed in office. And, on the other hand, the conclusion of law to which I come gets rid of the examination into motives, and simply lays down the clear and intelligible duty of summoning all the electors, so as to exclude the possibility of an unfair advantage being taken.

LITTLEDALE J. I am entirely of the same opinion. (After reading the fourth plea; and the words of the issue joined upon it, his Lordship said): The other pleas, which set up various particular customs, we may for the present treat as if they were not on the record. The question then is, whether the meeting at which the defendant was elected a burgess was duly assembled. It seems that the usage and custom was to serve a personal

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sonal notice on all the resident burgesses. But then the jury find also that if any burgess were omitted by accident, not design, the custom was still complied with. The reason for not summoning *Robertson* appears to have been, that he had told the serjeant not to summon him. The omission would, therefore, take place without any corrupt motive. If the serjeant had met *Robertson*, he might, perhaps, have given him notice: that would, however, have been pure accident, for the serjeant made no enquiry for him. *Robertson*, according to the serjeant's evidence, had dispensed with the service. But, whatever instructions the serjeant had received from *Robertson*, he was still bound to serve the notice upon him: for, supposing that *Robertson* had not altered his mind in the interval, which might have happened, still it is the duty of every burgess to attend the corporate meetings, although he may not intend to take any particular part in the proceedings. *Robertson*, therefore, had no power to give a dispensation to the officer. But, further, I think that the qualification of the custom found by the jury ought not to be taken into consideration at all. They find indefinitely, and without any limitation, that the custom is complied with, wherever the admission has been by accident, and not by design. According to this, there might be any number of accidental omissions: such a qualification cannot be good. Suppose, however, that the plea had specially set out the qualified custom found by the jury; and the question arose whether, in *Robertson's* case, it had been complied with. It would be clear that it had not been complied with; for the serjeant never intended to summon

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mon him, and omitted him, not by accident, but by design, although not from a fraudulent motive. Therefore I am of opinion, first, that the qualification of the custom is not good in law; secondly, that the facts do not support the verdict, even supposing the qualification good. Then the question is, whether this be merely a finding against evidence (in which case we should grant only a new trial), or whether the facts be so presented as to shew that the verdict should be entered for the crown. I think the custom as found by the jury not good in law. What then would be the use of sending the case to a new trial? On these facts, the jury could not find more favourably for the defendant than they have done; and, supposing their finding turned into a special verdict (for that is the way in which we are to consider the case), the judgment must be for the crown. The rule, therefore, must be made absolute.

WILLIAMS J. I am of the same opinion. Whether the meeting was duly assembled is a question of law. It appears that the finding of the jury is to be entered according as the Court shall direct upon the evidence; and we are therefore to look at the evidence. Now the fact is, that *Robertson* was omitted, not by accident, but in pursuance of a previous arrangement: that was an omission by design. Such an arrangement left it open *Robertson* to change his mind, and did not authorise the officer to omit the service.

COLERIDGE J. I am of the same opinion. I should be glad if, on these pleas, I could come to a different conclusion without its involving such consequences as have

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have been intimated by my Lord Chief Justice, and that we were not bound to go the length of saying that a verdict must be entered for the Crown. But the law is that, when a meeting, whether for election or amotion, takes place on a day not appropriated to that purpose by the constitution of the borough, notice must be given to all the members; and here the customary mode of giving such notice is found. It is, however, said that, on this finding of the jury, the custom found substantially involves the qualification, that an accidental omission does not violate the custom. It is not necessary to say whether such a qualification could be good. It is argued, that the omission here was, in reality, accidental, inasmuch as *Robertson* had informed the serjeant that he should be absent, and that, therefore, the serjeant need not serve him; that, consequently, the serjeant presumed him to be absent, and omitted to serve him from ignorance that the fact was otherwise. The evidence does not bear that out: the omission is referable to the unlawful dispensation given, in the first instance, by *Robertson*. Even a member of an indefinite body cannot give a dispensation of that kind. The notice is served, not for his personal benefit, but as an admonition to him to perform a public duty. He cannot exempt himself from these admonitions. I think, therefore, that there has been a wrong conclusion in point of fact; and that, under these circumstances, the verdict should be entered for the Crown.

Rule absolute. Leave granted to the defendant to turn the finding of the jury into a special verdict.

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Monday, January 25th.

The Bailiffs, Assistants, and Commonalty of GUMECESTER, otherwise GODMANCHESTER, *against* PHILLIPS.

1. A corporation brought trespass quare clausum fregit: defendant, who was not a member of the corporation (before the Rules of *Hil.* 4 *W.* 4.) pleaded; (1), Not guilty; (2), a right of common appurtenant to a messuage occupied by him. The case of the plaintiffs was, that only freemen had the right of common in respect of such occupation: Held, that a freeman of the corporation was not a competent witness for the plaintiffs, though no funds were shewn to belong to the corporation; and that stat. 3 & 4 *W.* 4. *c.* 42. *s.* 26. (which passed before the trial), did not remove the objection.

2. The freeman released to the corporation all his right, title, and interest as a freeman, or as occupier of any commonable messuage, and all interest in the lands, tenements, and other possessions of the corporation, and all right of common in the locus in quo belonging to him as a freeman, and all rights connected with the action: Held that, as he was himself a member of the body to which the release was made, it did not restore his competency.

3. The witness stated, on the voir dire, that he had been a freeman, but had resigned and been disfranchised at a corporate meeting: Held, that the defendant might, on the voir dire, cross examine him as to the number of persons present at the meeting, in order to ascertain whether it had been a regular meeting.

4. The witness on being asked, on the voir dire, how many assistants (who formed a constituent part of the meeting,) were present, answered, that a book then in Court would shew: Held, that on the voir dire, reference might be made to the book to ascertain what number was present.

5. The charter of the corporation created two bailiffs and twelve assistants, and enacted that the bailiffs and assistants for the time being should be the common council of the borough; that the bailiffs and assistants, for the time being, or the greater part of them, of whom [eorum, quorum] the bailiffs should be two, should make by-laws, should elect the recorder and town clerk, and should elect the bailiffs annually; if a bailiff died in office or was removed, the successor was to be chosen by the assistants for the time being, or the greater part of them; the assistants nominated in the charter to hold for life unless removed by the bailiffs and assistants for the time being, or the greater part of them, of which part the bailiffs should be two, and to be removable by the bailiffs and assistants for the time being, or the greater part of them (without the quorum clause); and in that case, or in case of death, the successor to be elected by the bailiffs and assistants then living or remaining, or the greater part of them (without the quorum clause), and so from time to time: Held, that a meeting, at which the two bailiffs and only six assistants were present, was not a regular corporate meeting for the purpose of accepting a resignation of a freeman, although the number of assistants was reduced below twelve by deaths; and that, consequently, a freeman was not made a competent witness by his resignation being accepted, and the acceptance entered in the book of the corporation, at such meeting.

6. An inclosure act directed, that commissioners should award to the corporation, who were owners of the soil of certain commons, a twentieth part of the commons by way of compensation. Plaintiffs having given evidence of acts of ownership in the locus in quo, the defendant, to shew that their right to it had been compensated for by allotments made by

TRESPASS for breaking and entering a close of the plaintiffs called *The West Common*, and trampling and depasturing it with two cows, &c.

First

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First plea, Not Guilty (*a*).

Second plea, that the defendant was seised in his demesne as of fee of a certain messuage in the parish of *Godmanchester*, and that he and all whose estate &c. from time immemorial, for himself and themselves, and their tenants, as occupiers of the said messuage, had common of pasture in *The West Common* for two cows at all times of the year, as to the messuage belonging and appertaining: justification in respect of the right of common. The replication traversed the right of common and manner and form &c. Issue thereon.

Third plea, justification in respect of a similar right of common on the 13th of *May*, and from thence to the 23d of *November*. The replication traversed the right of common in manner and form &c. Issue thereon.

Fourth plea, that the defendant was seised in his demesne as of fee of a certain messuage, being one of the commonable messuages mentioned in the act of parliament first after mentioned, and that he and all whose estate &c. from time immemorial, until the making of the award after mentioned, had right of common in a certain common within the parish of *G.* mentioned in the act of parliament first after mentioned, and therein called *The West Common*, for two cows &c. (as in the third plea) as to the last-mentioned messuage belonging and appertaining: that the said *West Common*, at the time of making the act, was one of the common fields, meadows, lands, commons, and commonable places within the parish of *G.* in the act mentioned: that by a statute, 43 *G.* 3. (*b*), entitled "An act for dividing and enclosing certain open and common fields,

by the commissioners, gave evidence that these allotments amounted to a twentieth part of the commons. In contradiction to this evidence, plaintiffs proved that a part of the land, which they alleged to be the common, consisted of uncultivated strips of land between the cultivated parts of the common and the lands of private proprietors, called balks; and plaintiffs gave some evidence of property in these balks. The Judge having left the question of property in the locus in quo generally to the jury, who found for the plaintiffs; Held, that it was not ground for a new trial, that the Judge did not tell the jury that, in presumption of law, the balks belonged to the owners of the adjacent land, unless the contrary were proved. Quære, as to such presumption.

(*a*) The declaration was entitled of *Michaelmas* term, 3 *W.* 4. (1832).

(*b*) Stat. 43 *G.* 3. *c.* 3. (local and personal, not printed).

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meadows, lands, commons, and commonable places, within the parish of *Gumecester* otherwise *Godmanchester*, in the county of *Huntingdon*;" after reciting that there were within the parish of *G.* certain open and common fields, meadows, lands, commons, &c., containing by estimation 4600 acres or thereabouts; and also reciting that the bailiffs, assistants, and commonalty of *G.* (whom the plea identified with the plaintiffs) were lords of the manor of *G.*, and as such did claim to be entitled to the right of soil within the said manor; and also reciting that different persons named there had several specified interests in the open and common fields, &c., intended to be inclosed as thereinafter mentioned; and also reciting the passing of the General Inclosure Act (41 *G.* 3. *c.* 109.); it was enacted that certain persons should be, and they were thereby appointed, commissioners for valuing, qualifying, dividing, setting out, allotting, and enclosing the said open and common fields, &c., and if any dispute should arise between the parties claiming to be interested in the division and inclosure, touching the right to the soil of the said common and waste grounds, or the rights and interests which any of them should claim to have in the same, or any other matter relating to the allotment, the commissioners were authorized and required to hear and determine such claims and objections; and the commissioners were thereby required to set out, allot, and award to the said bailiffs, assistants, and commonalty, and their successors, as lords of the manor of *G.*, such part of the said lands within the said parish of *G.*, thereby intended to be divided and enclosed, as, in the judgment of the commissioners, should equal one twentieth part of the waste or unknown common lands, within

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within the parish of *G.*, in lieu of, and as a full compensation for, all the rights and interests of the said bailiffs, assistants, and commonalty, as lords of the said manor, unto and to the soil of all the waste or unknown common lots within the parish of *G.*; and that the commissioners should set out, allot, and award, as a common pasture, to be enjoyed as thereinafter mentioned, out of and from certain commons in *G.* aforesaid, called the *East* and *West Commons*, such plot or plots of land or ground as should, in their judgment, be a full equivalent and compensation for the rights of common of all the owners and proprietors of commonable messuages or cottages, for such messuages or cottages only, as well on the said commons as on &c. (other lands in the act mentioned), within the parish of *G.*, which said plot or plots of land should be held and enjoyed by such owners or proprietors, and their respective tenants and occupiers of the said messuages or cottages only, as a common pasture in such manner as the said commissioners should, by their award, direct. The plea then stated that the commissioners set out, allotted, and awarded, as a common pasture to be used, stocked, and enjoyed by the owners and proprietors of commonable messuages or cottages, and their respective tenants or occupiers of the said messuages and cottages only, having right of common upon the respective commons of *G.* known as the *East* and *West Commons*, the following plots of land or ground: *East Common* Allotment, &c. — *West Common* Allotment (being the close in which, &c.), — And unto and for the owners and proprietors of commonable messuages or cottages and toftsteads, and their respective tenants or occupiers of the said messuages and cottages having right of common upon the *West Common*

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in *G.* aforesaid, one plot of land or ground (being the said close in which, &c.) containing, &c.; and the commissioners did thereby award that, from the 13th of *May* to the 23d of *November* in every year, every owner or occupier of any commonable messuage, or cottage, or toftstead, being the site of an ancient commonable messuage or cottage within the said parish according to the list contained in the schedule thereunto annexed, might stock upon the said *West Common* two cows for every such messuage, cottage, or toftstead: the plea then alleged that in the said list the commissioners inserted the said messuage of the defendant as one of the messuages in respect of which the owner or occupier thereof might use, stock, and enjoy the said *West Common*, being the said close in which, &c., as a common of pasture, in the manner and during the said times in that behalf specified in the said award. The defendant then justified by virtue of the act and award in respect of his seisin and occupation of the messuage, and of his right of common appurtenant thereto. The replication traversed the right of common until the award in manner and form as alleged in the plea. Issue thereon.

There were six more pleas; but this latter part of the record was before the Court upon demurrers, and judgment was given upon it for the plaintiffs, in *Trinity* term 1833 (*a*). The issues to the country

(*a*) *The Bailiffs of Godmanchester* v. *Phillips*, 5 *B.* & *Ad.* 198., where the act is more fully set out. It was held, in that case, that the act did not authorise the commissioners to extend the benefit of their allotments in lieu of common to occupiers who were not freemen; and that the award itself did not purport to do so. But, on the pleadings there, the defendant was held to have admitted that, antecedently to the act and award, he had no right of common as occupier only, without being a freeman. This was the question of fact raised by the joinder on the replication to the fourth plea, abstracted in the text above.

were

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were tried before *Bosanquet* J. at the *Huntingdonshire* Summer assizes 1834.

The plaintiffs put in the act of parliament mentioned in the fourth plea, and two charters, one of 14 *John*, and the other of 2 *James* 1. This last (the Latin original of which was put in, with a translation (*a*)) grants that the town of *Gumecester* otherwise *Godmanchester* shall be one body corporate and politic by the name of the bailiffs, assistants, and commonalty of the borough of *Gumecester*, otherwise *Godmanchester*, in the county of *Huntingdon;* and further "that, from henceforth from time to time for ever, there may and shall be in the borough aforesaid two of the honestest and discreetest burgesses in the said borough, chosen in form hereafter in these presents mentioned, who shall be named bailiffs of the said borough: and also that there may and shall be in the borough aforesaid twelve other of the honestest and discreetest burgesses of the said borough, chosen in form hereafter in these presents mentioned, who shall be named assistants of the said borough; which two bailiffs and twelve assistants for the time being shall be of the common council of the said borough: and that the said twelve assistants for the time being shall be from time to time assistants and helpers to the bailiffs of the said borough for the time being, in all causes, businesses, and matters, touching and concerning the said borough. And, further," "that the bailiffs and assistants for the time being of the said borough, or the greater part of them, of whom the bailiffs for the time being we will shall

(*a*) The *English* translation here given is from that put in. There is another translation, in some respects more correct, in *Fox's History of Godmanchester*, ch. vii. p. 133.

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be two [quod ballivi et assistentes burgi prædicti pro tempore existentes, vel major pars eorum (quorum ballivos burgi prædicti pro tempore existentes duos esse volumus)], upon public summons given them, and being for that end assembled, may and shall have full power and authority from time to time of granting, ordaining, and making of laws, statutes, constitutions, decrees, and ordinances whatsoever in writing reasonably, which to them or the greatest part of them, of which the bailiffs we will shall be two [quæ eis aut majori parti eorum (quorum ballivos burgi prædicti pro tempore existentes duos esse volumus)], seem good, wholesome, honest, profitable, and necessary, as shall seem so to be according to their sound discretions, for the good regimen and government of the said borough, and of all and singular the officers," &c. "and other matters and causes whatsoever concerning the said borough or any way appertaining." The charter appointed the first bailiffs and the first assistants, the latter to hold for life, unless removed for bad behaviour, &c., or some other reasonable cause, "by the bailiffs and assistants of the said borough for the time being, or the major part of them, of which part the bailiffs of the said borough we will shall be two [per ballivos et assistentes ejusdem burgi pro tempore existentes, vel per majorem partem eorundem, quorum ballivos ejusdem burgi pro tempore existentes duos esse volumus]." The charter then gave directions as to the future election and removal of the bailiffs, and proceeded as follows: "And we further will that, whensoever it shall happen that one or more of the aforesaid twelve assistants of the borough aforesaid die, or be removed from their offices of assistants of the said borough,

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borough, for any reasonable cause, which said assistants or any one or more of them, themselves not well behaving in their office, we will shall be removed at the good pleasure of the bailiffs and assistants of the borough aforesaid, for the time being, or the greater part of them," (without the quorum clause) "that then and so often it may and shall be lawful for the bailiffs and assistants of the borough aforesaid, then living or remaining, or the greater part of them," (without the quorum clause) "to elect, nominate, and appoint one or more others of the burgesses and inhabitants of the said borough, into the place or places of him or them assistant or assistants of the borough aforesaid, so happening to die or be removed, to fill the aforesaid number of twelve assistants;" &c. (the charter then directed the party elected to be sworn) "and thus from time to time as often as circumstances require." The same expressions respecting the elective body (with the quorum clause) occurred with respect to the elections of recorder and town clerk, and also with respect to the annual election of the bailiffs; but, in case of a bailiff dying in office, or being amoved, the successor was to be chosen by the assistants for the time being, or the greater part of them.

For the purpose of proving their possession of the locus in quo, the plaintiffs called a witness, who, being examined on the voir dire, said that he had been an assistant and freeman, but that he had been disfranchised, and had resigned his office and freedom. On being examined further, as to the disfranchisement and resignation, he stated that, at an assembly of the bailiffs and assistants, he had given in his resignation, which had been accepted. He was then asked, by the defendant's

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fendant's counsel, how many and what corporators had been present at the meeting. The counsel for the plaintiffs objected to this course of examination, on the ground that the declaration of the witness that he had been disfranchised was conclusive on the voir dire. The learned Judge ruled that the examination might be proceeded in; and the witness answered that the book would shew, referring to a book then in court, in which the proceedings of the assembly were entered. The defendant's counsel proposed to put it in, for the purpose of ascertaining whether the meeting was a regular one; and the plaintiffs' counsel objected, on the ground that the parol evidence was sufficient to negative the incompetency. The learned Judge ruled that the book might be put in. It then appeared by the entry that the meeting had consisted of the two bailiffs and six assistants; and the witness stated that, at the time of the assembly, there were but eight assistants in the corporation, including the witness. The witness then executed the following instrument, which was signed and sealed by him:—"Know all men by these presents, that I, *William Reeve*, of *Godmanchester*, in" &c. "have remised, released, and for ever quitted claimed, and confirmed, and by these presents do remise," &c. "unto the bailiffs, assistants," &c. of *G.*, "all my right, title, and interest, as a freeman of the said borough, or as occupier of any commonable messuage or premises whatsoever, and especially all interest in and to all the lands, tenements, and other possessions belonging to the said borough, and especially to all profits of common on the *West Common*, and to all privileges whatsoever belonging to me as a freeman of the same borough, and all rights whatsoever relating to or connected with an

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action now trying between the corporators of *Godmanchester* and *William Phillipps*, but of and from the same shall stand and be for ever barred and excluded by these presents. In witness whereof" &c. The defendant's counsel contended that neither the supposed resignation and disfranchisement, nor the release, rendered the witness competent: the learned Judge, however, after directing the name of the witness to be indorsed on the record under stat. 3 & 4 *W.* 4. c. 42. *s.* 27., received the evidence, giving leave to the defendant to move for a nonsuit, in the event of no other evidence being produced.

Other evidence was then given of acts of ownership by the corporation over the locus in quo.

In answer to the plaintiffs' proof of possession, the award was put in, by which it appeared that the commissioners had allotted to the corporation 19 A. 1 R. 16 P.; and the defendant gave evidence that this amounted to one twentieth part of the waste and common lands in the parish of *Godmanchester*; which evidence was given for the purpose of shewing that the plaintiffs had received a compensation for their rights over the locus in quo, under the act of parliament. The plaintiffs, in reply, called witnesses (*a*), who proved that, including certain balks or strips of uncultivated land, lying between the cultivated parts of the common and the land in the hands of private proprietors, the wastes and commons were, on the whole, more than twenty times as extensive as the part allotted to the corporation under

(*a*) On the subsequent motion it was urged that this evidence might have been given in chief, and ought not to have been admitted in reply; but the rule was not granted on this ground.

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the award. Acts of ownership on the balks were proved by the plaintiffs.

The learned Judge left it to the jury to say whether the locus in quo was the plaintiffs' soil, and whether the defendant had, until the time of the award, a right of common appurtenant to his messuage. He made no remarks to the jury on the subject of the balks, as distinguished from the other parts asserted to be common. Verdict for the plaintiffs on both issues. In *Michaelmas* term, 1834 (*November* 8) (*a*),

Biggs Andrews moved for a rule to shew cause why a nonsuit should not be entered, or a new trial had, on the following grounds. The witnesses were incompetent, as members of the corporation, and their competency was not restored by the supposed resignation and disfranchisement, nor by the release; nor is the stat. 3 & 4 *W.* 4. *c.* 42. *s.* 26. applicable. Further, the omission of the learned Judge to point out to the jury the law as to the balks was a misdirection. The balks are, by presumption of law, the property of the owner of the adjoining soil. [*Taunton* J. Is there such a presumption? The common instance of a presumption of that kind is in the case of roads. Balks are strips of land lying between lands which are private property: if the presumption be as you state, it is at any rate not so familiarly known.] The presumption is much stronger in the case of balks than of roads. The road may be used by all the king's subjects: no one but the owner can use the balk, which is commonly used for turning the plough, the land up to

(*a*) Before Lord *Denman* C. J. *Taunton*, *Patteson*, and *Williams* Js.

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it having been all ploughed. [Lord *Denman* C. J. The learned Judge and the jury, perhaps, considered that the evidence which tended to shew the balks to be part of the waste and commons, outweighed the presumption for which you are contending.] But, if the presumption had been explained to the jury, they would have required stronger evidence on the other side. The onus of proof would then have been thrown entirely on the plaintiffs (*a*).

Lord Denman C. J. Take a rule as to the competency of the witness. On the other points we will confer with the learned Judge.

Cur. adv. vult.

Afterwards, in the same term (*November* 25th), Lord *Denman* C. J. said that the rule must be refused on all the points, except that upon which it was already granted.

The case was argued in this term, *January* 25th and 28th (*b*).

Kelly, *Maltby*, and *John Bayley*, shewed cause.

There is no ground for a nonsuit, as there was evidence of possession independent of that given by the witnesses whose competency is questioned. But the rule must be discharged altogether.

First, the witness's assertion, on the voir dire, that he had resigned and had been disfranchised, is conclusive. The rule is that parol evidence on the voir dire may

(*a*) There were two other grounds of motion, which it is not thought necessary to state. As to one, see page 559. note (*a*), antè.

(*b*) Before Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* Js.

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either raise or remove objections to the competency without the production of documents of which the effect is given by the parol evidence; *Butchers' Company* v. *Jones* (*a*), *Rex* v. *Gisburn* (*b*). [*Coleridge* J. If the document be in fact produced it ought to be referred to; *Butler* v. *Carver* (*c*). Lord *Denman* C. J. The reference of the witness to the book comes to much the same thing as if he had produced the book.] The rule ought to be confined to this, that the document may be put into the witness's hands. [*Coleridge* J. Do you contend that, if a witness say that he takes no interest in a will, and the will be on the table of the court, it cannot be looked at for the purpose of ascertaining whether the witness has in truth an interest?] The Judge may direct the witness to look at it, and to say, after he has done so, whether he persist in his answer; but the Court will not look at it: the reason is, that the incompetency rests on the motive operating on the witness's mind by his belief that he has an interest. This was the course adopted in *Homan* v. *Thompson* (*d*). In *Perryman* v. *Steggall* (*e*), a witness was allowed to give parol evidence on the voir dire of his discharge under the Insolvent Debtor's Act, in order to shew his competency, though the objection to the competency arose, not upon any answer of the witness himself, but on the opening of the counsel who called him. If the practice were otherwise, the Judge at Nisi Prius would have several issues to try: here, for instance, he would have to try several issues in quo warranto; and he would have to determine both law and fact on the voir

(*a*) 1 *Esp.* 160.
(*b*) 15 *East*, 57.
(*c*) 2 *Stark.* 483.
(*d*) 6 *C.* & *P.* 717.
(*e*) 5 *C.* & *P.* 197.

dire.

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dire. [*Coleridge* J. Must not you then carry your objection further, and contend that the counsel objecting to the competency cannot cross examine the witness as to the way in which his competency has been restored?] Perhaps on principle the rule ought to be carried to that length: but here it is necessary only to say that the parol evidence must be conclusive. A party cannot come to trial prepared to contest every incidental issue of this kind. Suppose a bankrupt, on the voir dire, says that he has obtained his certificate and released his surplus: can the Court enter into an examination as to the number of creditors who have signed the certificate, and the amount of their debts, and the proportion to the number of other creditors, and the amounts of the debts of these latter?

Secondly, if the book could be looked into, still the resignation and disfranchisement are complete. The meeting was sufficient, under the terms of this charter. It is true that elections have been held insufficient, when made by less than a majority of the full number (independently of vacancies) of a part of the corporation consisting of a definite number; *Rex* v. *Bellringer* (*a*), *Rex* v. *Devonshire* (*b*). These decisions were made upon the particular terms of the several charters. Here, by the charter, it appears that there were, for the purposes of election, not two definite bodies, namely the two bailiffs and the twelve assistants, but one definite body of fourteen, made up of the two bailiffs and the twelve assistants. And eight of these fourteen were present. If the crown by the words

(*a*) 4 *T. R.* 810.

(*b*) 1 *B.* & *C.* 609. See *Rex* v. *Miller*, 6 *T. R.* 268.; *Rex* v. *Bower*, 1 *B.* & *C.* 492.

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"the bailiffs and assistants for the time being, or the greater part of them," had intended that there must be a majority of each constituent part present, the words requiring that the two bailiffs should make two of the majority of the whole would be superfluous. The only construction to be put on the clause is, that at least eight of the fourteen were to be present, the bailiffs being two of the eight. Now it is clear that, if a charter contain words taking the case out of the interpretation put upon the charters in the cases cited, that charter must be construed according to its own peculiar provisions. In *Rex* v. *Hoyte* (*a*) it was held that a clause in a charter (or, in a prescriptive corporation, an usage), that the majority of the remaining members of a definite body may elect, is good. In *Rex* v. *Headley* (*b*) a charter directed that the mayor, recorder, and chief burgesses, being the common council, of which chief burgesses the charter added that some were known or distinguished by the name of chief burgesses counsellors, were to elect; and there was a definite number of chief burgesses, thirty-six, of whom a definite number, twelve, were chief burgesses counsellors. It was held that, under the words of this charter, it was not necessary that there should be a majority of the twelve chief burgesses counsellors present, and that a majority of the thirty-six was sufficient: and *Bayley* J. said, "the necessity of the concurrence of a majority of each integral part depends entirely on the language by which the right of election is granted." Besides, the objection is not substantiated without shewing the usage to be such that the meeting, as holden on this occasion,

(*a*) 6 *T. R.* 430. (*b*) 7 *B. & C.* 496.

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is not regular. The assembly, therefore, being regular, the resignation and acceptance are sufficient. In 1 *Blackst. Com.* p. 484. it is said, "Any particular member may be disfranchised, or lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land: or he may resign it by his own voluntary act." The same law is collected in *Hammond's* edition of *Comyns's Digest*, [373] note (*h*), tit. *Franchises* (F 34); where, among other authorities, the following passage from the judgment of *Holt* C. J. in *Rex* v. *The Mayor of Rippon* (*a*) is referred to. "If a man speaks at large that he will not be alderman &c. that signifies nothing. But *è contra*, if he comes in an open assembly of the corporation, and there resigns his office, and declares that he will not continue in it longer, and desires them to accept his resignation, and they accept it, and elect another in his room, it is a good resignation. Indeed, if it was an office which lay in grant by deed, there ought to be a deed to surrender it; but when they are made by election, the corporation may accept a surrender by parol before them." The same law is adopted in *Comyns's Digest*, *Franchises* (F 30.) And in *Rex* v. *Chalke* (*b*) *Holt* C. J. said, "If a burgess be constituted by patent under the common seal, he ought to be discharged in like manner; but if by election, there it is only entered in the book, and an order is sufficient to discharge him; so that they may disfranchise him without any instrument under their common seal." [*Littledale* J. But the resignation must be accepted, or the disfranchisement made, at a regular corporate meeting; *Le Roy* v. *Tidderley* (*c*).] The meeting

(*a*) 1 *Ld. Raym.* 563. *S. C.* 2 *Salk.* 433.
(*b*) 1 *Ld. Raym.* 226. (*c*) 1 *Sid.* 14.

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here was regular, for the reasons before given. And perhaps it might be contended that, if a witness, who is objected to on the ground of interest, do all in his power to abandon the interest, his competency is restored, though effect may not have been given to the abandonment by the acceptance of the other party. Thus, in *Goodtitle* lessee of *Fowler* v. *Welford* (*a*), a witness was objected to, on the ground that he held an interest by devise in certain copyhold lands; he had surrendered to the heir at law, for the purpose of obviating the objection; and it was held that the refusal of the heir at law to accept the surrender did not prevent it from operating so as to restore the competency: and Lord *Mansfield* said that, the witness having parted with his interest, "as far as depends upon him, third persons have a right to his testimony, and the surrenderee shall not deprive them of it, by refusing to accept the surrender."

Thirdly, the release is sufficient, at all events, to restore the competency. "Where a freeman of a corporation is interested, the usual mode of removing the objection is by disfranchisement, but it is sufficient if he release his right to the corporation;" 2 *Starkie on Evidence*, Part iv. p. 427 (*b*). The objection to the competency must be founded on a private interest; *Rex* v. *Mayor, Citizens, and Common Council of London* (*c*). In *Burton* v. *Hinde* (*d*) the freemen were rejected ex-

(*a*) 1 *Doug.* 139.

(*b*) First edition. In the second edition (vol. ii. p. 245.) the passage, after the word "disfranchisement," stands thus: — "A release to the corporation of his interest in the subject-matter of the suit is insufficient when he has still an interest in the general funds;" citing *Doe dem. Mayor and Burgesses of Stafford* v. *Tooth*, 3 *Y.* & *J.* 19.

(*c*) 2 *Lev.* 231. (*d*) 5 *T. R.* 174.

pressly

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pressly on the ground that the rent of land, the right to which was in issue, belonged to the corporation; but here the release deprives the witness of all his interest in the lands. In *Weller* v. *The Governors of the Foundling Hospital* (*a*) the trustees of a public charity, taking no beneficial interest, were held to be good witnesses in an action brought against them in their character of trustees. A release was held to restore the corporator's competency in *Enfield* v. *Hills* (*b*). Thus the law stood, at any rate, till the case of *Doe dem. Mayor and Burgesses of Stafford* v. *Tooth* (*c*): there a release by a corporation of all right, title, and interest in the premises which were the subject of the suit was held not to restore the competency. That case, for the first time, decided that the circumstance of the corporation being liable to costs in case of failure was sufficient to give the witness an interest in the event. Admitting that case to be law, the release here is sufficient to restore the competency. In that case, the release was only of the subject-matter of the suit; and it was held that, as the witness still retained an interest in the other funds of the corporation, he was interested in exempting them from costs. But here no interest in any possessions or privileges can remain in the witness in his character of freeman: the words of the release are quite general.

Fourthly, whatever interest the witness had, his competency is saved by stat. 3 & 4 *W.* 4. *c.* 42. *s.* 26. The only objection to his competency must be "on the ground that the verdict or judgment in the action" "would be admissible in evidence for or against him."

(*a*) *Peake's N. P. C* 153.
(*b*) 2 *Lev.* 236. *S. C.* 2 (*Thomas*) *Jones*, 116.
(*c*) 3 *Y.* & *J.* 19.

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In order to entitle the witness to the common, or any other privilege of the corporation which is made good by this verdict, the verdict must be made evidence; and so it must in order to account to the defendant, upon his claiming any share in the funds, for the expenditure of any part of the corporation funds in satisfying the costs. Some cases at nisi prius, in which a restricted construction has certainly been put on the statute, are distinguishable from the present: if they are, however, to be considered applicable to the extent which must be contended for on the other side, the statute will be absolutely inoperative. [Lord *Denman* C. J. Perhaps the statute had in view, not the action created by that in which the witness is called, but other actions in which the judgment might be used as evidence.] In a case of *Hughes* v. *Wheeler*, tried before *Parke* B., at the *Middlesex* sittings after *Trinity* term, 1835, it was held that, in an action against the owner of a coach for mischief done to the plaintiff by negligent driving, the driver of the defendant's coach was a good witness for the defence; the learned Judge saying, that it was just the case which the act was intended to meet (*a*). [*Coleridge* J. Would not the construction which you put upon the act take away the second action altogether? for, without the evidence furnished by the verdict, what case would the master have against his servant?] That was probably the intention of the legislature. The object was to remove the motive which the witness would have to misrepresent. This is effected by the name of the witness being indorsed on the record.

(*a*) The verdict in that case was for the plaintiff; the ruling, therefore, could not be subsequently discussed. This case was cited by *Bayley* from a note taken by himself.

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Biggs Andrews, contrà. The evidence, independently of that of which the admissibility is now in question, was very slight as to the possession. But there must at any rate be a new trial.

First, it is true that what the witness says, on the voir dire, is to be received, although he give parol evidence of the contents of written documents. But it does not follow that his evidence is conclusive in the first instance: if so, he could not be cross examined as to the means by which his competency was said to be restored. If a witness say he has released his interest, he may be asked whether he means to say that he has signed a release; and questions may be asked for the purpose of ascertaining whether he be mistaken. So here, when the witness spoke of a resignation and disfranchisement, it was regular to cross examine him as to the way in which the proceedings had taken place. If he had answered that there were two bailiffs and seven assistants present at the meeting, it might have been irregular for the defendant's counsel to refer to the book; but, instead of answering so, he himself refers to the book as furnishing an answer to the question: the book, therefore, becomes evidence on the voir dire.

Secondly, the entry being made evidence, the proof of resignation and disfranchisement is negatived. There might even be ground for arguing that it was necessary for the witness to shew a disfranchisement by legal judgment; at any rate, if a judgment of disfranchisement were relied upon, it must be such as could not be avoided; "for, if it appears that the witness can avoid the judgment for irregularity, (as he may, if he has never been summoned, and knew nothing of his disfranchisement,) he is not competent;" 1 *Phillips on*

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Evidence, 127. (*a*); *Brown* v. *The Corporation of London* (*b*). But, admitting that a regular corporate meeting had power to disfranchise by accepting the resignation, the evidence shews that there was no such meeting. There should have been present a majority of the assistants. The rule is that, where the charter names a body, consisting of a definite number, as an integral part of an elective assembly, a majority of that body must be present, unless it be perfectly clear that the charter meant otherwise. Now here no other construction arises. It is said that, unless the meaning had been that the two bailiffs with enough assistants to make up in all a majority of the fourteen should be a good elective assembly, the requisition that the two bailiffs should be present would be superfluous. But that requisition may be accounted for on other grounds. The two bailiffs constitute a single officer, like the mayor: one cannot act alone; *Rex* v. *Smart* (*c*), *Regina* v. *Bailiffs, Burgesses, and Commonalty of Ipswich* (*d*), *Salter* v. *Grosvenor* (*e*). The requisition is, therefore, that the head officer shall make a part of the assembly; just as, where there is a mayor, the mayor and the other body or bodies are required to be present: [*Coleridge* J. In *Rex* v. *Greet* (*g*) it was held that a majority of each definite part was not necessary.] That arose from the peculiarity of the case; there were, among the definite bodies, two bailiffs; and, in the absence of express words to the contrary, it was held that the charter could not be construed to have intended that a majority of each should attend, inasmuch as, upon that construction, there would have

(*a*) Book I. part 1. c. 5. s. 8. (6th ed.)
(*b*) 11 *Mod.* 225.
(*c*) 4 *Burr.* 2241.
(*d*) 2 *Ld. Raym.* 1237.
(*e*) 8 *Mod.* 303.
(*g*) 8 *B. & C.* 363.

been

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been a dissolution of the corporation if any one bailiff had died in office, the bailiffs being eligible only by the same assembly. And it was considered that, as this could not be meant in the case of one body, it could not be meant in that of the others. But here the words are express, that both bailiffs shall attend; the presumption, therefore, that the charter requires a majority of each definite body, is strengthened. The general rule has been adhered to, where the words have at first sight, been very strong the other way, as in *Rex* v. *Bellringer* (*a*), and *Rex* v. *Devonshire* (*b*). In the latter, the charter required that the mayor should be one. [*Kelly.* In that case, the question whether there must be a majority of each integral part was alluded to by *Abbott* C. J., but he did not decide it (*c*).] In *Rex* v. *May* (*d*) the general rule was enforced against still stronger words. Here, if "them" be referred to the last antecedent, "assistants," the more obvious construction will be in support of the general rule. Again, the corporation do not appear to have acted on the resignation. In *Rex* v. *The Mayor of Rippon* (*e*) it is said that a party may revoke his resignation unless a successor be appointed.

Thirdly, the release is insufficient. The objection arises upon witness's interest in the present funds of the corporation, in the damages to be recovered in the particular action, in the subject matter in dispute (for the issue raises the question of the corporation's right to the land), and in shewing that the common was in right, not simply of a messuage,

(*a*) 4 *T. R.* 810. (*b*) 1 *B. & C.* 609.
(*c*) See p. 613. (*d*) 4 *B. & Ad.* 843.
(*e*) 1 *Ld. Raym.* 563. *S. C.* 2 *Salk.* 433.

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but of a messuage occupied by a freeman. The only authority in favour of the restoration of competency by a release is the dictum cited from the first edition of *Starkie on Evidence*, where no authority is given except *Enfield* v. *Hills* (*a*). But that case does not support the dictum, as is pointed out in the note to *Doe dem. Mayor and Burgesses of Stafford* v. *Tooth* (*b*), which case is itself an authority for the defendant on this point. In *Enfield* v. *Hills* (*a*) the *defendant* had released to the corporation all the advantages he might have against them by virtue of a by-law, under which by-law the corporation was to defray the costs. If *Phillips*, in the present case, had released to the corporation, the argument as to costs could certainly not have arisen. In *Willcock on Corporations*, p. 310. pl. 807., it is said, "If the evidence of a corporator be necessary, the only means by which he can be rendered competent, is his resignation or disfranchisement, which must be so far regular that he may neither be able to revoke his resignation, nor to reverse the proceedings on which he is disfranchised"; for which *Brown* v. *The Corporation of London* (*c*) and the note at the end of the *Mayor and Aldermen of Colchester* v. —— (*d*) are cited. So, in 1 *Phillips on Evidence*, p. 127. (*e*), the only means mentioned of restoring competency are resignation and the election of another, or disfranchisement. Nothing which has passed can relieve the witness, if the corporation have to pay costs to the defendant, from contributing to those costs, or, at any rate, to the costs of the plaintiffs. Even taking the release most strongly, a

(*a*) 2 *Lev.* 236. *S. C.* 2 (*Thomas*) *Jones*, 116,
(*b*) 3 *Y. & J.* 21. note (*c*). (*c*) 11 *Mod.* 225.
(*d*) 1 *P. Wms.* 596. (*e*) Book I. part 1. c. 5. s. 8. (6th ed.)

member

member of a corporation has not only privileges, but liabilities and duties, from which he cannot relieve himself by a simple act of release. And, moreover, this would be a release to a body of whom he is himself one; for the corporation has no existence independently of its several members; a release to the corporation is a release to himself; and, even if it could have any effect, he would still, as part of the corporation, continue interested. If this release were to take effect, every member of a corporation might become competent, by the ceremony of each person successively releasing to the corporation.

Fourthly, as to the statute 3 & 4 *W.* 4. *c.* 42. *s.* 26. The witness takes an interest in the result of the suit, independently of any use which could be made of it as evidence. The statute relieves from the incompetency only where the interest arises *merely* from the verdict or judgment becoming evidence; *Burgess* v. *Cuthill* (*a*). The corporation, in the event of their having to pay the costs, would have so much less to distribute to each corporator; and, in the event of their succeeding, so much more. That is an interest in the witness, independent of evidence of the verdict or judgment.

Cur. adv. vult.

Lord DENMAN C. J. in the same term (*February* 1st) delivered the judgment of the Court. In this case, we were told, in the first place, that the enquiry into the constitution of the meeting at which the resignation and disfranchisement were said to have occurred, could not properly take place. But it is clear that, under circum-

(*a*) 1 *M.* & *Rob.* 315.

stances

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stances like those of the present case, there is no rule to preclude such an enquiry. It is not necessary to lay down now any general rule as to the circumstances under which, or the extent to which, the answers of a witness on the voir dire may be canvassed or contradicted. It is clear at least that the legal effect of his own statement on the voir dire may be considered: and, where he makes a statement as to the restoration of his competency, which shews apparently that the restoration is insufficient, the objection remains unanswered. Now, in the present case, the witness, by referring to the entry in the book, made it a part of his own answer; and, the book being in Court, it was properly looked at as such.

We are then to look at the charter: and certainly we should have been glad if we had found that there was a disfranchisement sufficient to restore the competency. The question is, whether the two bailiffs and the six assistants constituted a sufficient assembly of the corporate body to receive the resignation. On this point the authority of the cases is too strong to be resisted. It is clear that there was not a proper assembly, and that, consequently, the resignation, not being duly accepted, was of no effect. The witness, therefore, continued to be a corporator up to the time of trial.

Then it was urged that the witness had personally released his claims. If it had been possible for any release, under these circumstances, to restore the competency, this would have been a sufficient release. But the party releasing is a member of the body to which the release is made. This was, therefore, a release of a party to himself, and could not have the effect attributed to it.

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Then recourse is had to the statute 3 & 4 *W.* 4. *c.* 42. s. 26. But we think that this statute does not apply to the present case (*a*).

The consequence is that the witness was throughout interested in the event of the suit, and that the verdict has been given partly on evidence which was objectionable. The defendant contends that he is entitled to a nonsuit; for that, independently of the evidence of the objectionable witnesses, no case is made out to affect him. But that is not the view taken by the learned Judge who tried the cause: the rule, therefore, must be for a new trial, not a nonsuit.

Rule absolute for a new trial.

(*a*) See *Pickles* v. *Hollings*, 1 *M.* & *Rob.* 468.; *Stewart* v. *Barnes*, 1 *M.* & *Rob.* 472.; *Creevey* v. *Bowman*, 1 *M.* & *Rob.* 496.

The KING *against* O'GORMAN MAHON.

Monday, January 25th.

A defendant being brought up for judgment for an assault, and it appearing that the prosecutor had commenced an action, which was still depending, for the same assault, the Court refused to pass any judgment except that the defendant should give security for his good behaviour, he having used violent language towards the prosecutor in addressing the Court. And this, although, at the time of the defendant being brought up, the prosecutor offered to discontinue the action.

THE defendant, having been convicted of an assault, was now brought up for judgment. It appeared on the affidavits that the prosecutor had commenced an action for the same assault. [Lord *Denman* C. J. Has that action been discontinued? It is a rule that the Court cannot pass sentence for an assault while an action is depending for the same assault.]

Platt (with whom was *Miller*), for the prosecution, said that the prosecutor had not discontinued the action, but offered to do it now.

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Lord DENMAN C. J. It is too late now; it should have been done before. The Court cannot pass sentence for the assault under these circumstances. But as the defendant, in addressing the Court, has used violent expressions towards the prosecutor, he must give security to keep the peace. That is all that can be ordered.

The Court ordered and adjudged that the defendant should enter into his own recognizance with two sureties to be of good behaviour towards all his Majesty's subjects, and the prosecutor in particular, for two years, and that he should be imprisoned in the custody of the marshal till the recognizance was given, and the sureties found (*a*).

(*a*) Ex parte ——, Gent., One, &c.

Friday, Nov. 11. 1836.

The Court refused a rule for a criminal information for an assault, upon its appearing that the applicant had taken out a warrant against the other party, though the applicant offered that it should be part of the rule that he should abandon the proceedings on the warrant.

SIR *J. Campbell*, Attorney-General, moved, at the instance of an attorney, for a criminal information against an attorney of this Court, for assaulting him in consequence of proceedings taken by the latter professionally. It was admitted that the party applying had taken out a warrant against the other attorney, on which he had been held to bail; but the applicant offered that the proceedings on this warrant should be abandoned, and that such abandonment should be part of the rule. But

Per Curiam (Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.). If we granted the rule, it could only be on that understanding; but, as the party has already commenced proceedings, we think it best that he should be left to the course which he has adopted in the first instance.

Rule refused.

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Tuesday, January 26th.

ASSUMPSIT. The first count of the declaration (which was dated on the 5th of *July* 1834) stated that one *James Stewart*, on &c., drew a bill of exchange on *Joseph Watkinson* for 26*l.* 10*s.* at three months, payable to the order of the said *James Stewart*, which *Watkinson* accepted, that "the said *James Stewart*" indorsed to the defendant, who indorsed "to the said *James Stewart*, who then and there indorsed the same to the said plaintiff;" that *Watkinson* did not pay, though the bill was presented when due, of which the defendant had notice.

Plea, that, after the presentment to, and non-payment of the said bill of exchange by, the said *Joseph Watkinson*, as in the said first count mentioned, to wit, 14th of *July* 1836, the plaintiff did, without the knowledge, authority, or consent of the defendant, accept, receive, and take of and from "the said *James Stewart*," a cognovit in a certain action before then commenced by the plaintiff against "the said *James Stewart*" in the Court of King's Bench, for the recovery of the said sum of money in the said bill of exchange specified; and the plaintiff did, in and by such cognovit, agree to give,

Declaration stated that *S.* drew a bill, payable to his own order, on *W.*; that "the said *S.*" indorsed to defendant, who indorsed to "the said *S.*," who indorsed to plaintiff; and that *W.* did not pay, of which defendant had notice. Plea, that, after the dishonour, plaintiff, without defendant's authority, took from "the said *S.*" a cognovit in an action commenced by plaintiff against *S.* for the recovery of the sum specified in the bill, and, by the cognovit, agreed to give, and did without defendant's authority actually give, to *S.* longer time for payment than the time in which plaintiff might have obtained judgment against *S.*:

Held that, upon this declaration, it must be intended that the person to whom defendant indorsed was, and was known by plaintiff to be, the person who indorsed to defendant; and that the plea, therefore, was sufficient, though it did not state in what character *S.* had been sued by plaintiff, the action against defendant being in any case a fraud on the cognovit.

Held also that, upon general demurrer, the plea was good, though it did not allege the cognovit to have been taken before the action commenced, and was pleaded in bar of the action generally, and not in bar of its further maintenance.

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give, and in pursuance of such cognovit did, without the knowledge, authority, or consent of the defendant, actually give, to "the said *James Stewart*," much longer time for the payment of the said bill of exchange than the time in which the plaintiff might and would have obtained judgment against "the said *James Stewart*," in the said action, if the same had been prosecuted with due diligence and without such granting of time as aforesaid.

General demurrer, and joinder.

Archbold for the plaintiff. First, the plea is in bar of the action generally: but it is not averred that the cognovit was taken before the commencement of the action; and, if it was taken after, it can be pleaded only in bar of further maintenance of the action. And this objection may be taken on general demurrer. *Lee* v. *Levy* (*a*) shews that the fact alleged in the plea, if it took place after the commencement of the action, could not have been given in evidence under the general issue, before the late rules; but, if the objection now taken were merely matter of special demurrer, such evidence could not have been excluded under the general issue. Secondly, the plea does not state whether, in the action in which the cognovit was given, the plaintiff sued *Stewart* as drawer or first indorser, or as an indorser subsequent to the defendant. As every plea must be taken most strongly against the party pleading, it must be taken that *Stewart* was sued in the latter character. Then this is merely the case of time given to a party subsequent to the defendant, which constitutes no dis-

(*a*) 4 *B.* & *C.* 390.

charge.

charge. If it be said that, even if *Stewart* was sued as an indorser subsequent to the defendant, still, since the defendant, if the plaintiff now recovered, might sue *Stewart*, the bringing this action is a fraud on the cognovit, the answer is, that the identity of *Stewart* the drawer with *Stewart* the last indorser is not alleged and cannot be presumed.

Wightman contrà. As to the first point, if the plea would be made good by the addition of the word "further," the objection can only be ground for special demurrer. As to the second point, the identity of the party appears from the declaration, where the person to whom the defendant indorsed is called "the said *James Stewart*." This is therefore a case in which time has been given by the plaintiff to a party prior to the defendant. Suppose the defendant were now to pay the plaintiff, he would have no remedy over against *Stewart*, for the right of action, if once suspended by the party entitled, is destroyed for all collateral purposes; *Lord North* v. *Butts* (*a*); and the present defendant is no longer liable to the plaintiff, *Gould* v. *Robson* (*b*), where Lord *Ellenborough* said that the holder, by giving time to the acceptor, bound, not only himself, but all others whose names were upon the bill, from suing while it was in his hands. Time given to *Stewart* in one character would enure to him in another. Indeed, he cannot properly be said to be a subsequent party to the defendant, for he could not have sued the defendant, because of the circuity of action, though there could be

(*a*) *Dyer*, 140 *a*. pl. 39. (*b*) 8 *East*, 576.

no

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no such objection to the defendant suing *Stewart*: *Abbott* C. J. in *Britten* v. *Webb* (*a*), *Chitty on Bills*, p. 29. (8th ed.) [*Littledale* J. Suppose the bill to be accepted by *Stewart* and indorsed by him to the defendant for goods sold and delivered, and that afterwards the defendant, finding himself indebted to *Stewart* on another account, gives him the bill in part payment: might not *Stewart* strike out his own name?] If he wished to be relieved from his situation as a party prior to the defendant, he would strike out his name: if he lets it remain, the transaction does not alter his relation to the other parties.

Archbold in reply. If an indorsee chooses to indorse back to his indorser, he takes upon himself whatever risk may accrue from the indorser's new situation as a subsequent party. And, if time be given to the first indorser in the character of subsequent indorser, the intermediate indorser cannot treat him, for that purpose, as a prior indorser. It cannot be true, generally, that *Stewart* could not sue the defendant: for suppose the defendant had received notice of dishonour, but had not given notice to *Stewart*; then *Stewart*, if he paid the bill, might sue the defendant, for the defendant, for want of notice, would have no remedy over against *Stewart*. But, further, there is at any rate no allegation that the plaintiff knew the identity of *Stewart*; if he did not, there is no fraud on the cognovit in his now suing the defendant. If the defendant sued *Stewart* as a prior party, *Stewart* could not plead the cognovit without averring that he had paid the money.

(*a*) 2 *B.* & *C.* 485.

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Lord DENMAN C. J. The first objection appears to me to be matter, not of substance, but form. As to the second objection, I feel some doubt whether the defendant should not have averred that the plaintiff knew of the identity of the party; for, in strictness, it is quite consistent with this record that he should have believed that these were distinct parties. But, since the declaration describes the indorsee of the defendant as "the said *James Stewart*," it lay upon the plaintiff, if he dealt with him in a character distinct from that of indorser to the defendant, to allege it.

LITTLEDALE J. The plea would indisputably have been good, if it had distinctly alleged the identity of *James Stewart*, and the plaintiff's knowledge of that identity. Now the declaration says that the defendant indorsed to "the said *James Stewart*," who indorsed to the plaintiff. That is an allegation of the identity; and, as the plaintiff alleges the identity, we must hold that he knew it. That being so, if he took the cognovit before the commencement of the suit, he cannot recover, since by giving time to any party he discharges all subsequent parties. It is consistent with the plea that the cognovit might have been taken before the action commenced; and therefore the want of the allegation that it was so taken is only matter for special demurrer.

WILLIAMS J. I think, upon the allegations in the declaration, the identity of the party must be assumed. Then, on the face of the plea, it sufficiently appears that time has been given to a party on the bill prior to the defendant. This is a substantial defence: the first objection goes only to the form, and is not available on general demurrer.

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COLERIDGE J. On this record, I think we must take it that the plaintiff knew of the identity of the party. It would then be a fraud on the cognovit, if it was given to *Stewart* in one character, to sue him in another. Then the case comes within the general principle, that, if you give time to a party, you shall not, in fraud of that arrangement, sue another who will sue him.

Judgment for the defendant.

Tuesday, January 26th.

DOE on the Demise of ELEANOR SHELLEY and Others *against* EDLIN and Another.

Testatrix devised estates to *N.* in fee, in trust to receive and apply the proceeds to the use of *S.*, the sister of the testatrix, for her life, and, from and immediately after the decease of *S.*, to convey the same to such uses as *S.* should by deed or will appoint. There was no devise over. *S.* died in the lifetime of the testatrix: Held,

1. That the death of *S.* in the testatrix's lifetime was not an implied revocation of the will.

2. That the estate devised to *N.* did not lapse by reason of *S.*'s death, but vested in *N.* at the death of the testatrix.

3. That the estate so vested in *N.* was an absolute legal fee.

THIS case was argued in *Easter* term 1834 (*May* 26th), on a rule to shew cause why a nonsuit should not be entered, by *Talfourd* Serjt. and *Cowling* against, and *Jervis* and *Justice* in support of, the rule. The judgment of the Court states the facts and discusses the authorities so fully, that a further report of them is unnecessary.

Lord DENMAN C. J. now delivered the judgment of the Court as follows: —

This was an ejectment, which was tried before my brother *Gurney*, at the *Summer* assizes for the county of *Oxford*, in the year 1833. The lessor of the plaintiff claimed as heir at law to *Jane Newell*, the person last seised, who died in the year 1830. The defence set up was under a will of *Jane Newell*, who, being seised in fee of the premises in question, on the 23d of *July* 1813, devised, amongst other things, as follows: —

"I give,

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"I give, devise, and bequeath unto my friend *Charles Nundy*, of *Watlington* aforesaid, draper, all my real estates, and the rest and residue of my personal estate, whatsoever and wheresoever, which I shall die seised of or entitled unto, to hold unto him, the said *Charles Nundy*, his heirs, executors, administrators, and assigns, upon special trust and confidence, that he the said *Charles Nundy*, his executors, administrators, or assigns, do and shall receive the rents, issues and profits and annual proceeds thereof, and of every part thereof, and pay and apply the same unto and to the use of my sister *Mary Maretta Maria Scoolt*, for and during the term of her natural life, for her own sole and separate use, as if she was sole and unmarried, and without being subject or liable to the control, debts, contracts, and forfeitures, disposal, or engagements of her present or any future husband; and the receipts and discharges of the said *Mary Maretta Maria Scoolt*, and of such person or persons as she shall, from time to time, direct to receive the said rents, issues, dividends, profits, and annual proceeds, shall be good and effectual releases and discharges to the said *Charles Nundy*, his executors, administrators, and assigns, for so much money as in such receipts shall be acknowledged or expressed to be received. And, from and immediately after the decease of the said *M. M. M. Scoolt*, upon this further trust, that he the said *C. Nundy*, his heirs, executors, administrators and assigns do and shall convey my said real estates, and assign and transfer and pay the rest and residue of my said personal estate to such uses, upon such trusts, and to and for such intents and purposes, and with and under and subject to such powers, provisoes, and declarations, and in such parts, shares, and

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proportions, as she the said *M. M. M. Scoolt*, notwithstanding her coverture, by any deed or deeds, writing or writings, to be sealed and delivered by her, in the presence of, and to be attested by, two credible witnesses, or by her last will and testament, in writing, purporting to be her last will and testament, or codicil, to be signed, sealed, and published by her in the presence of and to be attested by three or more credible witnesses, shall give, devise, bequeath, direct, limit, or appoint. And I appoint the said *Charles Nundy* sole executor of this my last will and testament."

Mrs. *Scoolt* died in the lifetime of her sister *Jane Newell*, four years before the summer of 1833; but the latter made no alteration in her will. Mr. *Nundy*, the trustee named in the will of *Jane Newell*, died in *January* 1833, having previously made his will, dated 12th of *January* 1831, by which will, after reciting the bequests in the will of *Jane Newell*, and reciting that the said real or personal estates were not given over in the event of the death of the said *M. M. M. Scoolt* in the lifetime of the said *Jane Newell*, and which event had happened, and that doubts were entertained whether the said *Jane Newell* left any heir-at-law or next of kin; he gave, devised, and bequeathed all the said real estates late of the said *Jane Newell*, and all the residue of her personal estate, unto *Thomas Joy*, his heirs, executors, administrators and assigns, to hold the same or such part thereof to which no better title could be shewn, for his and their own use and benefit; but, in case it should appear that the said *Jane Newell* left an heir at law, then to hold the same in trust to convey the said real estates to such heir; and, in case it should happen that the said *Jane Newell* left next of kin, then

to

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to hold the residue of the said personal estate upon trust to assign, transfer, and pay such residue unto such next of kin.

On these wills being proved, the counsel for the defendants submitted that the plaintiff should be nonsuited, as the effect of these wills, or rather of the first will alone, was to take the legal estate out of the heir-at-law. The counsel for the plaintiff insisted that the will had no such effect, inasmuch as Mrs. *Scoolt* died in the lifetime of her sister the testatrix. Mr. Baron *Gurney* said he should not nonsuit the plaintiff; but he gave leave to move the Court for liberty to enter a nonsuit; and he summed up the case of the lessor of the plaintiff as to his pedigree; and the jury found a verdict for the plaintiff. A rule nisi was afterwards moved for, to enter a nonsuit; and cause has since been shewn before me, my brother *Littledale*, my late brother *Taunton*, and my brother *Williams*.

The objections to this will of *Jane Newell* branch themselves into three heads: —

First, that there is an implied revocation of the will arising from a change of the circumstances of the testatrix.

Second, that the devise is lapsed in consequence of the death of Mrs. *Scoolt* in the lifetime of the testatrix, and that the objects of the will having altogether failed and become inoperative, the trusts expressed in the will never arose, and the estate never vested in the trustee.

Third, that, where an estate is devised to trustees for particular purposes, the legal estate is vested in them so long as the execution of the trust requires it, and no longer; and, therefore, as soon as the trusts are either satisfied, or become inoperative and incapable of

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taking effect, the legal estate will vest in the person beneficially entitled to the property.

On the first of these points was cited *Doe dem. Lancashire* v. *Lancashire* (*a*). The point there decided was that, whereas it had been before considered a rule of law that marriage and the birth of a child amounted to an implied revocation of a will of lands, the Court, in *Doe dem. Lancashire* v. *Lancashire* (*a*), extended the rule to the case of marriage and the birth of a posthumous child: the decision itself, therefore, has nothing to do with the present case: but the plaintiff would contend that the opinions expressed by the Judges in that case go to shew in general that an alteration in the circumstances of the devisor will amount to a revocation of the will. But the language of Lord *Kenyon* evidently shews that he confined these circumstances to what related to the family of the testator himself, and that, if he should marry and have children, there should be a tacit condition annexed to the will itself at the time of making it, that the party does not then intend that it should take effect if there should be a total change in the situation of the family. But the change here made is the death of one of the family of the testatrix, and not new objects of affection and blood arising who would have a better claim to her bounty. Lord *Kenyon*'s language does not contemplate any such case. *Buller* J. says that an alteration of circumstances may amount to a revocation of a will of lands; but his comments afterwards apply to the case then before the Court. But I know of no case where it has been held that the removal of an object of affection and bounty by death has been taken to be an implied revocation of a will; and in my

(*a*) 5 *T. R.* 49.

opinion

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opinion it does not operate so: I may also remark (though that would not vary the decision if the present case were within it) that the rule, as to marriage and the birth of a child amounting to an implied revocation of a will of lands, is not of universal application; for it does not apply in cases where the whole estate is not devised by the former will; nor where a man has been married before, and there are children of the first marriage (at least not in all such cases), nor where the marriage is in contemplation, and the intended wife, and the children the testator may have by her, after her marriage, have a provision made for them under a former will.

As to the second question, whether this is a lapsed devise, or whether the estate was vested in the trustee at all, I may here state that there is no doubt whatever, at the present day, but that a devise like the present to a trustee to receive the rents and profits, and pay them over to a married woman for her separate use, and afterwards to convey them as she shall direct, vests the legal estate in the trustee (*a*); but, as to the extent of the quantity of estate, that will be considered on the third point of the case; and therefore this trustee had the legal estate under the will.

The rule is well established that, if a devisee dies in the lifetime of the devisor, the estate lapses; but that applies to cases where it is a devise of the legal estate. It has also been held in *Hartop*'s Case (*b*) that a use will lapse; as, if an estate be devised to *A.* for the use of *B.*, and *B.* dies, it will lapse; but that is a use executed

(*a*) The plaintiff's counsel admitted this, as a general proposition, referring to *Doe dem. Booth* v. *Field*, 2 *B.* & *Ad.* 564.

(*b*) 1 *Leon.* 253. *S. C. Cro. Eliz.* 243. (cited, *Com. Dig. Devise* (K.), p. 382.).

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by the statute, and is the same thing as if the estate had been directly devised to *B.*

I will not say what would be the case as to a lapse if this was a pure naked trust with nothing for the trustees to do; as if a devise was to *A.* and his heirs to the use of *A.* and his heirs in trust for *B.*, where the trustee was a mere nominal party to keep the legal estate in him, to prevent its going to the cestui que trust, and the trustee had no duties to perform; but this is a trust where duties are cast upon the trustee; he is to receive the rents and profits; and, therefore, if rent becomes due the day after the death of the devisor, or if a field of hay or corn be to be cut, his duty is to possess himself of them. If there be no person named in the will to receive them, a court of equity must say what is to be done with them. Perhaps this illustration does not carry the case further, because, if the legal estate does not vest in him, he would in point of law be a wrongdoer in receiving the rents and profits.

But in my opinion the legal estate does not lapse according to the rule of law applicable to lapsed devises. Whether, if the trusts become inoperative and incapable of being carried into effect, the legal estate will be taken out of him, will form the subject of consideration on the third question (*a*).

The third question is one of more difficulty. In *Doe dem. Player* v. *Nicholls* (*b*) *Bayley* J., in delivering his

(*a*) In addition to the cases referred to in the judgment, the plaintiff's counsel cited *Doe dem. Burdett* v. *Wrighte*, 2 *B.* & *Ald.* 710. (second point), as shewing that, where an estate is devised on a trust which cannot be executed, the devise itself becomes void, or at all events (no beneficial interest being devised to the trustee) the legal use results to and is executed in the heir-at-law; on which last point they referred to the judgment of *Holroyd* J., p. 723. They also cited *Com. Dig. Uses*, (D 2.): "So, if the use declared is void or impossible," &c.

(*b*) 1 *B.* & *C.* 336.

judgment,

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judgment, says: "It may be laid down as a general rule, that where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer, and therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it." And he adds that *Doe dem. White* v. *Simpson* (*a*) and *Doe dem. Pratt* v. *Timins* (*b*) are authorities upon that point. And *Holroyd* J. in the same case says that a trust estate is not to continue beyond the period required for the purposes of the trust.

If the rules above mentioned, as laid down by these judges, be confined so as to say that the trustees originally take only that quantity of interest which the purposes of the trust require as far as is expressed by the words used in the instrument itself, or by the apparent intention of the maker of the instrument consistent with the language of it, then I admit the rule to be correct. But if it be meant to apply to all cases in general where the trusts are no longer capable of being carried into effect, but yet the instrument, by the legal construction of it, already gave an estate which might continue for a longer period than that during which the objects of the trust had an actual existence, then that in my mind will admit of a different consideration.

I admit that, for a great number of years past, the Courts have held that trustees take that quantity of interest which the purposes of the trust require; and the question is, not whether the maker of the instrument has used words of limitation or expressions adequate to convey an estate of inheritance, but whether the

(*a*) 5 *East*, 162. (*b*) 1 *B.* & *Ald.* 530.

exigencies

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exigencies of the trust require a fee, or can be satisfied by a less estate.

This is established in a great variety of cases not necessary for me to go through: they are of a very multifarious description, and many of them embracing very nice distinctions, and admitting a difficulty in their being reconciled.

I am satisfied with their establishing the rule as I have above admitted; they will be found in the references in the case *Doe dem. Player* v. *Nicholls* (*a*), above referred to, and in the references in the cases of *Doe dem. White* v. *Simpson* (*b*), and *Doe dem. Pratt* v. *Timins* (*c*), above mentioned to have been cited by Mr. Justice *Bayley;* and I may refer to the subsequent cases of *Warter* v. *Hutchinson* (*d*), *Glover* v. *Monckton* (*e*), *Doe dem. Brune* v. *Martyn* (*g*). But these cases are such as that the Courts held upon the construction of the instruments themselves, and for the purpose of carrying the trusts into execution, and in some instances coupled with the apparent intention of the testator, that the trustees took only an estate either for years, or for an uncertain chattel interest, or for the lives of themselves or others, or a base fee determinable upon certain events; and that construction has been put upon the various wills, though in some of them the testator has used words of limitation, or which of themselves alone, if not coupled with other expressions, would seem to carry an estate of inheritance.

But I think that, in this instance, the testatrix has used words which carry an estate of inheritance, and

(*a*) 1 *B.* & *C.* 336.
(*b*) 5 *East*, 162.
(*c*) 1 *B.* & *Ald.* 530.
(*d*) 1 *B.* & *C.* 721.
(*e*) 3 *Bing.* 13.
(*g*) 8 *B.* & *C.* 497.

that

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that there is nothing in her will, either in expression or apparent intention, which shews that the exigencies of the trust can be satisfied by the trustee taking a less interest than an absolute estate in fee simple. The trustee is to convey for such estate as the sister of the devisee may direct, and, therefore, may have to do so in fee; he cannot do this unless he has an absolute fee, which he can convey. He cannot be said to have a base fee determinable upon certain events, for what is the event on which his fee is to determine? The answer is, his conveying the property. But when he conveys there is an end of his trust and estate altogether, which thereby becomes executed: but that is nothing like a base fee determinable upon events which make it cease before it comes to its natural termination in its character of a fee simple of inheritance. A determinable fee ceases upon the happening of a certain event without the aid of a conveyance. But this estate of the trustee cannot cease until he has made a conveyance of a fee, or some beneficial interest, so as to execute his trust. Till that is done I think that the trustee retains the legal estate: and it is no answer to say that some collateral events have disabled him from carrying the trusts into effect.

I have not adverted to the case of *Burgess* v. *Wheate* (*a*), cited in the argument, as I do not think it would go to decide any part of the present question, even if it could be taken as clear and undoubted law; as to which see Lord *Henley*'s note in page 259. of the case.

I am of opinion, therefore, that the legal estate is out of the lessor of the plaintiff who claims as heir-at-law,

(*a*) 1 *W. Bl.* 123. *S. C.* 1 *Eden's Ca. Ch.* 177.

and

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and that he cannot recover in ejectment: and, consequently, the rule to enter a nonsuit must be made absolute.

Rule absolute.

Tuesday, January 26th.

Batcheldor *against* Hodges.

In debt for a penalty, on stat. 17 *G.* 2. *c.* 3. *s.* 3., for not permitting the inspection of a poor rate, the declaration described the plaintiff as "an inhabitant of the parish:" Held, that this sufficiently shewed that he was a party aggrieved.

The declaration described the defendant as "assistant overseer" in the parish, and alleged that he, as such assistant overseer, had the rate in his possession: Held, that this sufficiently shewed his duty and liability.

Plea, that the plaintiff had no right to inspect the rate, it not being a subsisting rate, or such a rate as he was entitled to inspect: Held, bad on general demurrer.

DEBT against the defendant, as assistant overseer of the parish of *New Windsor*, for a penalty of 20*l.* on stat. 17 *G.* 2. *c.* 3. *s.* 3, The declaration stated that the plaintiff, at the several times &c., was an inhabitant of the said parish, and the defendant was assistant overseer in the said parish; it then stated that a poor rate was made and allowed, and notice thereof duly given, and that afterwards, and at a reasonable and seasonable time in that behalf, to wit, &c., the plaintiff requested the defendant, as such assistant overseer, to permit him to inspect the said rate, and tendered the defendant 1*s.* for the same: and, although the defendant, as such assistant overseer, had the said rate in his possession, yet the defendant would not permit the plaintiff to inspect the same rate, and had neglected and refused &c.

Second plea. That the plaintiff, when he so requested &c., had not any right whatever to inspect the said rate, the said rate, at the said time when &c., not being a subsisting rate for the relief of the poor of the said parish, or such a rate as the plaintiff was entitled to inspect. Verification.

Conceded, that no answer was furnished by pleas stating facts which shewed that the time for appealing against the rate had elapsed before the request to inspect was made.

Third

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Third plea. That the said rate was an old rate made for the relief &c., to wit, 10th *July* 1834, afterwards duly allowed by two justices &c., notice whereof was duly given by &c., on the 13th of *July* 1834; and that the time of appealing against or questioning the validity of the said rate had expired long before the demand of inspection by the plaintiff, and that no appeal had been made or notice given by the plaintiff of appeal against the rate, or of any intention on his part to question the validity of the rate, before or at the time when he requested &c.; wherefore the defendant did not permit &c., but did refuse &c., as he lawfully &c. Verification.

Fourth plea. Allegation of the making, allowance, and notice of the rate; and that, after it was made, allowed, and published, to wit, 17th *October* 1834, a general quarter sessions of the peace for &c. was duly held at &c., being the next general quarter sessions of the peace held &c. after the rate was made, allowed, and published (for the purpose, amongst other things, of appeals), and that, no appeal or notice of appeal against the rate having been made or given by the plaintiff or any other person before the holding of the said general quarter sessions, although sufficient time for such purpose intervened between the making, allowance, and publication of the rate and the holding of the said Court, the said justices so assembled at &c. did take no order therein; and that the time for taking such order therein had elapsed long before the plaintiff so requested &c. Justification and verification as before.

General demurrer to the second, third, and fourth pleas. Joinder.

Curwood,

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Curwood, for the plaintiff. The pleas demurred to appear to have been drawn upon the assumption that the only object of inspecting, contemplated by the statute, is that the party inspecting may appeal. There may be other reasons for allowing inspection; as, for instance, that a party may know whether he is entitled to vote at an election of a member of parliament. The language of the second plea is unmeaning: every rate is a subsisting rate, however old, and although all the arrears be paid.

Channell, contrà. The third and fourth pleas certainly cannot be supported. But the second plea furnishes an answer to the declaration. The legislature intended to give the power of inspecting such rates only as can be enforced, but not rates which do not subsist, as, for instance, rates which have been quashed. Also the declaration is bad. First, it does not show that the plaintiff is aggrieved. It merely states him to be an inhabitant; it does not even state that he is rated. In *Spenceley* v. *Robinson* (*a*) it was held that a plaintiff, under this section, must shew that he is actually aggrieved. That case was considered by the Court, in *Bennett* v. *Edwards* (*b*); in which case a party was held to be aggrieved by the mere refusal to allow him to inspect the rate. But there, though the declaration did not aver that he was rated, he proved at the trial that he was in fact rated. Here the objection is taken on demurrer; and no grievance appears. There was a new trial on another point, in *Bennett* v. *Edwards* (*b*), and afterwards a rule for arresting the judgment (*c*):

(*a*) 3 *B.* & *C.* 658. (*b*) 7 *B.* & *C.* 586.
(*c*) *Bennett* v. *Edwards*, 8 *B.* & *C.* 702.

and,

and, on the argument upon the rule, the defendant did not raise the point now under consideration, conceiving, probably, that the previous decision in the same case shewed that the objection could not be taken after verdict. This also accounts for the objection not having been raised in the argument on error upon the judgment, in *Edwards* v. *Bennett* (*a*), in the Exchequer Chamber. Secondly, the declaration states only, as to the defendant, that he was assistant overseer, and no more. That is not sufficient on demurrer. In the first case of *Bennett* v. *Edwards* (*b*) the declaration stated, in some counts, that the defendant was assistant overseer; and, the general issue being pleaded, it appeared at the trial merely that he was assistant overseer, under stat. 59 *G.* 3. *c.* 12. *s.* 7.; and no evidence being given what the duties were which the vestry had assigned to him, the Court, after verdict for the plaintiff, directed a new trial, that the nature of his duties might be ascertained. They must therefore have held such a declaration as the present bad on demurrer. On the second trial (*c*), the defendant refused, upon notice, to shew his appointment; and the Judge left it to the jury, on the evidence, whether it was part of his duty to produce the rate. The jury having found for the plaintiff on the counts charging that he, as assistant overseer, had the rate in his custody, a rule was obtained to arrest the judgment, on the ground that the declaration did not shew that it was the defendant's duty to shew the rate; and the declaration was held good after verdict (*d*); *Littledale* J. saying there was "only just sufficient on the record to turn the scale against the

(*a*) 6 *Bing.* 230. (*b*) 7 *B.* & *C.* 586.
(*c*) Note (*a*) to *Bennett* v. *Edwards*, 7 *B.* & *C.* 594.
(*d*) *Bennett* v. *Edwards*, 8 *B.* & *C.* 702.

defendant;"

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defendant;" which appears also to have been the opinion of the other Judges. They would therefore have held the objection fatal before verdict. This judgment was affirmed on error brought; *Edwards* v. *Bennett* (*a*). There *Tindal* C. J. said, "Had the objection been made on demurrer, it must have prevailed; but there is enough to enable us to intend, after verdict, that he was found to be a person liable to the penalties of the act." The cases are therefore, on the whole, in favour of the objection thus taken. It will be said that here the defendant is alleged, as assistant overseer, to have had the rate in his possession. But that was also alleged in the declaration in *Edwards* v. *Bennett* (*a*).

Curwood, in reply. As to the objection, that no grievance is shewn, the language of the second section is "all and every the inhabitants;" and that of the third "any inhabitant or parishioner." The mere refusal to permit inspection to an inhabitant is a grievance within the terms of the act. As to the other objection to the declaration, the averment, that the defendant had the possession, clearly satisfies the requisite of shewing his duty; no other party could be applied to for inspection. In the cases cited, it was not necessary to decide more than that the objection failed after verdict: no inference can be drawn from them that it would have prevailed on demurrer.

Lord DENMAN C. J. The pleas appear not to be insisted upon; and I think the declaration good. *Spenceley* v. *Robinson* (*b*) certainly introduced a new term into the statute; and I think the ruling in that

(*a*) 6 *Bing.* 230. (*b*) 3 *B.* & *C.* 658.

case

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Bancroft against Honors.

case, as to the present point, must be considered as abandoned by general consent. An inhabitant may be aggrieved by the very fact of not being rated. As to the other point, the doubt of Lord Chief Justice *Tindal* is certainly of great weight, and entitled to the highest respect. He might, perhaps, be speaking of a special demurrer. But at all events, as the defendant here is stated to have had possession of the rate as assistant overseer, every necessary point is upon the record; the act comprehends every "other person authorised" to take care of the poor; and I do not see how it was possible to bring the defendant more distinctly within its provisions.

LITTLEDALE J. One objection to the declaration is disposed of by *Bennett* v. *Edwards* (*a*). That case shews that an assistant overseer is within the act. As to the other objection, the act does not require that the party applying should be more than an inhabitant: the declaration is, therefore, sufficient. There are many purposes for which persons, as inhabitants, may require inspection. They may wish to vote for a member of parliament, or to exercise other privileges dependent upon their being rated. At all events, as the statute does not require that the applicant should be rated, we have no right to import such a requisite.

WILLIAMS J. It seems to me that the plaintiff is a party aggrieved within both the intent and words of the act. As to the other objection, a doubt arose in *Bennett* v. *Edwards* (*b*) as to what was the duty of the assistant

(*a*) 8 *B. & C.* 702. (*b*) 7 *B. & C.* 586.

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overseer in the particular instance; and the case was sent down for a new trial, in order that this might be ascertained. Here the question arises on the record, and I think that sufficiently shews the duty. Besides, the statute adds the words "or other person authorised as aforesaid."

COLERIDGE J. I think Mr. *Channell* was right in not insisting upon the pleas. I will merely observe, as to the second plea, to prevent mistakes on the part of overseers, that it appears, on comparing stat. 17 *G.* 2. *c.* 3. with stat. 17 *G.* 2. *c.* 38. (*a*), that the duty applies as well to old rates as to any others, and that the public are equally entitled to inspect all. As to the first objection to the declaration, it would be strange if it were not sufficient to follow the act. The act (sect. 2.) says "all and every the inhabitants of the said parish," and the declaration alleges that the plaintiff was an inhabitant of the said parish. As to the other objection, the words of the act (sect. 3.) are "churchwarden or overseer of the poor, or other person authorised as aforesaid," that is, by reference to the first section, "authorised to take care of the poor in every parish," &c. The statute is therefore applicable in terms.

Judgment for the plaintiff (*b*).

(*a*) See sections 13, 14, 15.

(*b*) See *Whitchurch* v. *Chapman*, 3 *B.* & *Ad.* 691.

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FRANKLIN *against* MILLER.

Tuesday, January 26th.

ASSUMPSIT. The first count stated that defendant, being indebted to divers persons, undertook, by a certain agreement, to pay plaintiff the full amount of all accounts paid for defendant by him, with the expenses, and further to pay over to plaintiff 40*l.* per quarter of his (defendant's) salary, until the said debts should be fully settled; and that, by the said agreement, plaintiff agreed to advance a sovereign per week, and the rent of 5*l.* 5*s.*, also Mr. *Moxey* 5*l.* 3*s.* 2*d.*, and Mr. *Morrison* 5*l.* per quarter out of the said 40*l.*, which would become due respectively on the first days of *January*, *April*, *July*, and *October*. And that, in consideration of the premises, and of plaintiff's promise to perform the agreement, defendant promised to perform &c. on his part. And although plaintiff on &c., and on divers other days &c., paid for defendant to divers persons, to wit, &c. (naming them), divers accounts, being debts due and owing from defendant to those persons respectively, and amounting in the whole to a large &c., to wit 28l*l.*, the divers persons (naming them) to the amount of 28l*l.*; that the whole amount of debts was not yet settled; and that several sums of 40*l.* had become due from defendant under the agreement, which had been paid to the amount of 160*l.* only, but the rest were unpaid.

Declaration stated that defendant, being indebted to certain persons, agreed to repay plaintiff the amount of all accounts which he should settle for defendant; and also to pay plaintiff 40*l.* a quarter on stated days, till the said debts should be fully settled; and plaintiff agreed to advance to defendant 1*l.* per week, and certain other sums, out of the sums of 40*l.*; that, in consideration of plaintiff's promise, defendant agreed to perform the contract on his part; that plaintiff paid debts for defendant to

Plea, as to two of the sums of 40*l.*, that, before they became due, plaintiff had omitted to pay certain of the debts due to creditors of defendant (naming them), other than the creditors named in the declaration, which he might have paid; and had also omitted, after the last payment of 40*l.*, to pay defendant 1*l.* per week; wherefore defendant in a reasonable time, and before the two sums in question were due, rescinded the contract.

Replication, that, before and at the time of the last payment of 40*l.*, defendant was indebted to plaintiff in the sum of 50*l.* and more, in respect of the monies paid by plaintiff for defendant as in the first count mentioned; and that the said 40*l.* was insufficient to discharge the amount in which defendant was so indebted to plaintiff, and for which the agreement was a security:

Held, that the plea was bad, as shewing, at most, only a partial failure of performance by the plaintiff, which did not authorise the defendant to rescind the contract.

Quære, whether the replication was good. Held, by *Coleridge* J., that it was bad.

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full amount of which accounts defendant was liable to, and ought to have paid to plaintiff according to the agreement, whereof &c. (notice to defendant): and although since the making of the agreement, and before the commencement of this suit, divers, to wit, five of the sums of 40*l.* in the agreement mentioned, have become due from defendant to plaintiff according to the agreement, to wit, on *October* 1st 1833, and the first days of *January*, *April*, *July*, and *October* 1834, and although the debts mentioned in the agreement have not been fully settled, and although defendant hath paid a part, to wit, 160*l.* of the amount of the said accounts so paid as aforesaid, and of the said sums of 40*l.* so due as aforesaid, yet &c., breach, that defendant hath not paid the residue of the full amount of the said accounts, or of the said sums of 40*l.* which became due as aforesaid, though requested, to wit on &c., so to do; and there is now due to plaintiff &c. The same count also charged a breach of contract by defendant, in not paying expenses incurred by plaintiff in settling the accounts paid as aforesaid.

Third plea, as to the first three sums of 40*l.*, payment.

Fourth plea, as to the non-payment of two sums of 40*l.*, alleged in the declaration to have become due *July* 1st and *October* 1st, 1834: that long before the same or either of them became due, to wit, *May* 1st, 1834, and on divers other days and times afterwards, and before the said 1st of *July* 1834, there were persons, to wit, &c. (mentioning three persons different from those named in the declaration), the residue of the said persons, to whom defendant, at the time of the making of the said agreement, was, and then still continued, indebted in divers sums of money, whereof plaintiff then had notice, and plaintiff could and might then have fully paid

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or otherwise settled their said debts, had he used due and reasonable care and diligence in that behalf; but plaintiff did not nor would fully pay or settle the same, and carelessly and negligently suffered and permitted the same to be and remain unpaid and unsettled. And defendant further saith that, although he did afterwards, to wit, *April* 1st 1834, pay to plaintiff the said sum of 40*l.* to be by defendant paid to plaintiff on that day for the purposes in the said agreement mentioned; yet plaintiff did not, nor would, thereout or otherwise, at any time afterwards, although often requested so to do, advance to defendant a sovereign per week, but wholly neglected so to do; and thereupon defendant, within a reasonable time then next following, and before the said last mentioned sums of 40*l.* became due and payable, to wit, *May* 20th 1834, rescinded and put an end to, and abandoned the said agreement, and gave plaintiff notice thereof, and that defendant should not require plaintiff to perform the same in any thing further on his part and behalf to be performed and fulfilled. Verification.

Replication to the fourth plea, that, before and at the time when defendant paid plaintiff the sum of 40*l.* in that plea alleged to have been so paid, defendant was indebted to plaintiff in a large sum of money, to wit, 50*l.* and more, for and in respect of the said money paid by plaintiff for defendant as in the said first count is mentioned; and that the said last mentioned sum of 40*l.*, at the time when the same was paid by defendant to plaintiff, was of less amount than, and was insufficient to satisfy or discharge, the said money in which defendant was indebted to plaintiff as last aforesaid, and for which money the said agreement in the said first count mentioned was then a security to plaintiff. Verification.

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Demurrer to the replication, assigning for causes, that, although the defendant hath, in his fourth plea, alleged that he paid plaintiff the 40*l.* for the purposes of the agreement, the plaintiff hath not in his replication shewn any excuse for not applying it to those purposes, and hath endeavoured to apply it to other purposes and debts which by law he could not do; that the replication does not specifically shew how the 40*l.* was appropriated, nor what was the subject-matter of the debt due from defendant to plaintiff; that the replication is a departure; and that, although defendant in his fourth plea hath shewn another breach by plaintiff of the said agreement sufficient to enable defendant to rescind the same, plaintiff hath not, by his replication, traversed or denied, or confessed and avoided the said breach, and hath admitted it. Joinder in demurrer.

R. V. Richards in support of the demurrer. The replication admits that the sum of 40*l.* was received, and was, by agreement, to be appropriated to a particular purpose. It could not be applied to a different one, by making a set-off of the demand to which it was so applied. The question then may be, whether the fourth plea is one which would be bad on general demurrer. Now, whether the word "rescinded" be correctly used in the plea or not, still, where two parties have agreed to do certain acts concurrently, and one seeks to enforce performance by the other, it is a sufficient answer that he himself has not fulfilled his part of the contract. The defendant here was not bound to go on paying the sums of 40*l.* although they were not properly applied. In *Withers* v. *Reynolds* (*a*), where the

(*a*) 2 *B.* & *Ad.* 882.

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defendant agreed to supply the plaintiff with straw at so much per load, to be paid for (as the Court construed the agreement) on delivery, it was held that, on the plaintiff's refusal to continue paying on delivery, the defendant might leave off sending straw, and that he was not obliged to go on with the supply and bring a cross-action. The judgments of the Court in that case apply to the present. The plaintiff here was to pay a sovereign per week out of the 40*l.* which the defendant was to advance. By ceasing to pay the sovereign, he virtually put an end to the contract. [*Coleridge* J. Is not there a distinction between a partial and a total non-performance?] In *Withers* v. *Reynolds* (*a*) the plaintiff had only refused to pay for one load of straw; yet the defendant was held to be discharged from his contract.

W. Clarkson, contrà. The replication is good. The declaration shews that the payments of 40*l.* by the defendant were to be antecedent to those which the plaintiff was to make, but that the plaintiff had, in fact, paid a considerable sum, in advance, to certain persons named. Then the plea alleges that before *July* 1, 1834, there were persons (naming them) whom the plaintiff might have paid but did not, and that, although the defendant on *April* 1st, 1834, paid the plaintiff 40*l.*, to be applied to the purposes of the agreement, yet the plaintiff did not afterwards advance the sovereign per week. To the new matter so alleged, the replication is an answer. It states that, when the 40*l.* was paid on *April* 1st, 1834, the defendant was indebted to the

(*a*) 2 *B.* & *Ad.* 883.

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plaintiff in a large sum, for money paid by the plaintiff, as stated in the first count, that is, in discharge of the debts there referred to, beyond the amount advanced by the defendant. It does not (as is suggested on the other side) claim to appropriate the 40*l.* to demands of the plaintiff on other accounts than those comprehended in the agreement. The replication here is like the surrejoinder in *Calvert* v. *Gordon* (*a*), which was held good. The plaintiff shews that he has performed his contract as long as he had the means. The fourth plea discloses no act done by him which could warrant the defendant in rescinding the contract. On this point *Withers* v. *Reynolds* (*a*), and particularly the judgment of *Patteson* J. there, is an authority for the plaintiff.

R. V. Richards, in reply. One object of the agreement was, that out of the 40*l.* the plaintiff should be enabled to pay the defendant a sovereign per week. The plaintiff cannot, in his replication, set up a right to retain, inconsistent with the stipulations of his agreement.

Lord DENMAN C. J. The defendant, by his plea, says, "true it is, I did not pay the sums claimed, but there were some debts which you might have paid and have not, and you have not paid me the sovereign per week; therefore I have rescinded the contract." And this is said when the plaintiff is considerably in advance. It is clear that the defendant had no right to treat the contract as rescinded. That is illustrated by the judgment of *Patteson* J. in *Withers* v. *Reynolds* (*b*), where it is said,

(*a*) 7 *B.* & *C.* 809. (*b*) 2 *B.* & *Ad.* 882.

"If

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"If the plaintiff had merely failed to pay for any particular load, that, of itself, might not have been an excuse to the defendant for delivering no more straw." As, therefore, the defendant, here, has not shewn a valid excuse by his plea, it is unnecessary to consider whether or not the replication be bad.

LITTLEDALE. J. With respect to the plea, the plaintiff may say, "assuming that there has been a default made as to my part of the contract, it is only a partial breach, and the defendant's argument would go the length of insisting that if I had in any one week omitted to pay the sovereign, he might put an end to the contract, and deprive me of all the money I have paid in advance: for he states that he has rescinded the agreement altogether." It is a clearly recognised principle that, if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to. In *Boone* v. *Eyre* (*a*), which was an action of covenant on a deed whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation with the stock of negroes upon it, in consideration of an annuity, and covenanted that he had good title and was lawfully possessed of the negroes, and the defendant covenanted that, the plaintiff performing every thing in the deed contained on his part, he would pay the annuity, and the breach alleged was non-payment, the defendant pleaded that the defendant was not lawfully possessed of the negroes. On demurrer to the plea, Lord *Mansfield* said, "The distinction is very clear. Where mutual

(*a*) 1 *H. Bl.* 273. note (*a*).

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covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." So here, it cannot be contended that, if in any one week the sovereign had been unpaid, that default would put an end to a contract made up of several stipulations, some of which have been executed. It is immaterial to consider whether or not the replication be good.

WILLIAMS J. concurred.

COLERIDGE J. I think both the replication and the plea bad. The plea is not good, unless one party to a contract like this may treat it as rescinded, if the other fails in the slightest degree to perform his part of it. The rule is that, in rescinding as in making a contract, both parties must concur. In *Withers* v. *Reynolds* (*a*) each load of straw was to be paid for on delivery. When the plaintiff said that he would not pay for the loads on delivery, that was a total failure; and the plaintiff was no longer bound to deliver. In such a case it may be taken that the party refusing has abandoned the contract. The present case is different; and the plaintiff is entitled to judgment.

Judgment for the plaintiff.

(*a*) 2 *B.* & *Ad.* 882.

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Wednesday, January 27th.

ON appeal against an order of two Justices, whereby *Thomas May* and his wife, and their children, were removed from the parish of *Saint Mary* in the town of *Nottingham* to the township of *Whiston* in the West Riding of *Yorkshire*, the sessions confirmed the order, subject to the opinion of this Court upon the following case.

The pauper, a poor boy of and legally settled in the township of *Dinnington* in the said West Riding, was, in *December* 1818, pursuant to an order of two Justices of the said Riding, bound apprentice by the churchwardens and overseers of the poor of *Dinnington*, to *James Herring*, residing within the township of *Whiston* in the same Riding, by indenture duly signed and allowed, for a term therein mentioned; and he served *Herring* under the indenture for more than forty days in *Whiston*. The township of *Dinnington* is about five miles from the township of *Whiston*; each township maintains its own poor separately; and both are within the same county, and within the jurisdiction of the peace of the two magistrates who made the order for the binding, and who afterwards signed their allowance of the indenture. On the hearing of the appeal at the general quarter sessions for the town and county of the town of *Nottingham*, the respondents refused to call evidence to prove that notice was given by the overseers of *Dinnington* to the overseers of *Whiston*, of their intention to bind out such apprentice, no evidence having

Under stat. 56 *G.* 3. *c.* 139. sects. 1. 2., when an apprentice is bound from one parish into another, the indenture is not valid for the purpose of settlement, unless notice has been given to the overseers of the latter parish, pursuant to sect. 2., before the indenture was allowed.

But, on appeal against an order of removal grounded on such indenture, the respondents are not bound in the first instance to prove such notice: if there be no evidence to the contrary, the notice will be presumed.

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having been offered by the appellants to prove that such notice was not given. The question for the opinion of this Court was, whether the respondents were bound, under the circumstances, to prove that notice was given.

Whitehurst, in support of the order of sessions. First, if the notice was not in fact given according to stat. 56 G. 3. c. 139. s. 2. (a), the binding is not therefore void. The object of the statute, as appears from the preamble, was the protection of poor children by enforcing an application to justices, and a proper enquiry by them, before the binding takes place. Sect. 5. enacts, "that no settlement shall be gained by any child who shall be bound by the officers of any parish, township or place, by reason of such apprenticeship, unless such order shall be made, and such allowances of such indenture of apprenticeship shall be signed, as hereinbefore directed;" but that cannot mean that the settlement shall be defeated if the child has not been bound under all the circumstances and with all the preliminaries required by the previous sections. If that were so, it would follow that the master, who is not called upon to take part in the preliminary proceedings,

(a) Stat. 56 G. 3. c. 139. s. 2. (latter part) is as follows: — "Provided always, that no indenture shall be allowed by any justice of the peace for the county into which such child shall be bound, who shall be engaged in the same business, employment or manufacture in which the person to whom such child shall be bound is engaged; and notice shall be given to the overseers of the poor of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice of the peace for the county or district within which such parish or place shall be, shall allow such indenture; and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice, and admit such notice."

and

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and may be totally a stranger to them, would lose the benefit of the indenture, and would, by sect. 6., be subject to a penalty, if the notice here in question were omitted. It is sufficient if the words "such order" and "such allowance" in sect. 5. be taken to mean an order in the form required by the act, and an allowance by the proper justices. [Lord *Denman* C. J. The notice is a very important protection to the child. *Coleridge* J. And to the parish into which he is bound.] Secondly, it was at any rate not necessary to prove the notice. The order comes in question incidentally, and in a proceeding to which it is merely collateral. An order valid on the face of it is produced; and that, primâ facie, is conclusive. Where, on the trial of an appeal, one party produces an order of removal unappealed against, the justices who made such order are presumed to have taken the proper steps till the contrary is shewn. This is a similar case. A culpable omission must be proved by the party who relies upon it; the opposite party is not bound in the first instance to negative such omission: *Williams* v. *The East India Company* (*a*).

M. D. Hill, on the same side, was stopped by the Court.

Milner, contrà, after citing *Rex* v. *Threlkeld* (*b*) on the first point, was stopped by the Court as to this. Then, as to the second point, it being clear that the notice was essential, the respondents were bound to give proof

(*a*) 3 *East*, 192. (*b*) 4 *B.* & *Ad.* 229.

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of it, as of other facts affirmed by them. There is no ground, in ordinary cases, for presuming that such proof cannot be given. The appellants here are called on to prove a negative, and that in a case where the facts could not be within their cognisance. Under the new poor law, stat. 4 & 5 *W.* 4. *c.* 76. *s.* 79., the removing parish sends to the parish which is to receive the pauper a copy of the examination upon which the order is made; here the appellants had not even that information. They could not be supposed to know what passed as to the allowance of the indenture. The respondents, who rely on the indenture, ought to have that knowledge; they could have obtained it from the pauper before they made the order; or, at least, they might have shewn that they had instituted every proper enquiry without success. They are not, therefore, entitled to have the fact of notice presumed in their favour. Proof of a negative is never required, except in answer to something (as a charge of crime) primâ facie established.

Lord DENMAN C. J. I think this is a clear case, and rests on broad principles. I agree in the general doctrine stated by Mr. *Milner*, that a party is not to be called upon to prove a negative, except where there is something to be removed by him; but here was affirmative evidence, the effect of which the appellants had to remove. A proceeding had been taken by parties executing an important public duty; and there was no reason to suppose that they had acted incorrectly. If an enquiry was to be gone into on that subject, the difficulty was to be encountered by those parties who chose to say that the indenture, which appeared a legal instrument, was

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an invalid one. The respondents had made a strong primâ facie case. The order of sessions, therefore, was right.

LITTLEDALE and WILLIAMS Js. concurred.

COLERIDGE J. The general rule is that, where a duty is performed by a public officer, he is presumed to have discharged it rightly. That presumption arose here, and the appellants were called upon to meet it by such proof as would raise a counter-presumption. In *Rex* v. *Hasling field* (*a*) commissioners under an inclosure act had altered the parochial situation of a road, by transferring it from one parish to another, which the act empowered them to do, after giving certain notices; but the first parish had continued to repair the road. A question being raised, whether or not the giving of the notices was to be presumed, the Court held that it was not. There a counter-presumption was raised by the fact, that the practice as to repair had continued unchanged; but the learned Judge who tried the cause said that "he should have had no difficulty in admitting the award, if the usage had been pursuant to it, presuming that the proper notices had been given."

Orders confirmed (*b*).

(*a*) 2 *M. & S.* 558.

(*b*) See *Rex* v. *Witney*, *Trinity* term 1836, (*May* 28th) post.

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Pauper hired a house and lands, from *Michaelmas* 1832 to *Michaelmas* 1833, for 30*l.*, and entered into occupation at *Michaelmas* 1832. In *July* 1833 he assigned to *W.* all his debts, securities, stock, effects, utensils in trade, household goods, furniture, crops growing or severed, implements of husbandry, cattle, live and dead stock, and all other personal estate and effects, to have, hold, and take the said monies, &c., live and dead stock, and all other the premises assigned, to *W.*, on trust to cultivate the lands as long as the crops then growing should remain, and to sell the stock, crops, &c., and receive the amount of the valuation to be made as between outgoing and incoming tenant at quitting the land; and *W.* was to be possessed of the monies, on trust, first, to pay costs and charges, next to pay the rent, taxes, &c., which were or should be due during the continuance of the trusts, and next to pay creditors of the pauper, parties to the deed. In *August* 1833, *W.* sold the stock, effects, and crops, which were cut and carried away by the purchasers; and afterwards *W.* paid the rent for the year out of the produce of the property assigned. Pauper, by himself or family, occupied the house till *Michaelmas* 1833.

Held, that there was neither an undivided occupation for the year, nor a payment of rent by the pauper, to satisfy stat. 1 *W.* 4. *c.* 18. *s.* 1.; and that no settlement was gained.

ON an appeal against an order of two justices (dated 7th of *April* 1834) removing *Edmund Reader* from the parish of *Pakefield* to the parish of *Walpole*, both in the county of *Suffolk*, the Sessions quashed the order, subject to the opinion of this Court on the following case:—

On *Old Michaelmas* day 1832, the pauper, who had previously been settled in *Walpole*, entered upon the occupation of a beer house and several acres of land in *Pakefield*, which he had previously hired for a year at a rent of 30*l.* for the house and land, and 10*l.* for certain brewing utensils in the house, and continued to occupy the house and land until *July* following. On the 17th of that month, being in embarrassed circumstances, he assigned his property to one *Waterson*, for the benefit of his creditors, by a deed which was put in, and which was to form part of this case (*a*). The deed was executed by *Waterson*.

On

(*a*) The indenture was dated 17th *July* 1833, and made between *Edmund Reader*, of the first part; *Thomas Waterson*, of the second part; and the several creditors signing and sealing, of the third part. It recited that

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On the 1st of *August* following, *Waterson*, under this deed, sold all the pauper's stock, farming implements, furniture, and other effects, and also the crops then growing

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that *Reader* was indebted to the parties of the third part in the sums respectively set opposite their names, and, being unable to discharge the debts, had agreed to assign "all his personal estate and effects whatsoever and wheresoever" to *Waterson*; and it was witnessed that, in pursuance of the agreement, and in consideration of 10*s.*, *Reader*, at the request and by the appointment of the parties of the third part, bargained, sold, and assigned to *Waterson*, his executors, &c., "all and singular the debts and sums of money now due and owing to him the said *Edmund Reader*, and all securities and books of account for or relating to the same, and all and singular the stock, effects, and utensils in trade, household goods and furniture of him the said *E. R.*, and also the crops of corn, grain, and hay, whether growing or severed, muck, summerland, implements of husbandry, cattle, live and dead stock of him the said *E. R.*, now being in, upon, or about the messuage or tenement, outhouses, lands, and hereditaments in his occupation in *Pakefield* aforesaid, *and all other the personal estate and effects whatsoever and wheresoever* of him the said *E. R.*, and which he shall be possessed of, or interested in, or entitled to, at the execution of these presents (the necessary wearing apparel of himself and family only excepted), and all the estate, right, title, and interest whatsoever of him the said *E. R.* in and to the same and every part thereof; to have, hold, demand, receive and take *the said monies, stock, effects, and utensils in trade, household goods and furniture, corn, grain, hay, muck, summerland, implememts of husbandry, cattle, live and dead stock, and all and singular other the premises hereby assigned,*" to *W.*, his executors, &c., as and for his own goods, &c., *upon trust to cultivate and manage the lands as long as the crops now growing thereon should remain*, and for that purpose to employ such persons as he should think proper, and use the cattle and implements then on the premises in the management and getting in of the same; and to sell the stock, effects, crops, &c., and get in the debts, &c., and to receive the amount of the valuation to be made on the land as between outgoing and incoming tenant at the quitting and giving up the same. And it was declared that *W.*, his executors, &c., should stand and be possessed of the monies that should arise from the sale, &c., on trust, first to pay costs and charges of preparing, &c. the deed, and carrying the trusts into effect, and of managing the land, and next "*to pay and discharge the rent, rates, taxes, and tithes which now are, or at any time during the continuance of the trusts hereby created shall be due and*

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growing upon the land: the crops were cut and carried away by the purchasers, but the straw and colder were either left upon the premises or brought back for the use of the incoming tenant: part of the furniture was purchased for the pauper; but, after the sale, he was not possessed of any farming implements, or any stock, excepting a pig, which, after the crops were carried off, was turned out to shack upon the land. The pauper paid no rent himself; but *Waterson* paid the landlord 30*l.* 10*s.* towards the rent, 20*l.* 13*s.* in money out of the produce of the sale of the pauper's effects, and 9*l.* 17*s.* by the summertilths and muck on the land, and certain fixtures in the house which were taken by the landlord at that sum.

The pauper, with his family, consisting of his wife and four children, continued to live in the house and carry on the business, drawing beer there, and making profit thereof; he buying it, and bringing it from *Lowestoft* as he wanted it; on which profit he lived until *Tuesday* the 8th of *October* 1833. On that day he removed to a house which he had previously hired at *Yarmouth*, distant about twelve miles from *Pakefield*, taking with him his wife and three children, and all his effects, excepting a few articles of furniture, which were left in the house at *Pakefield* because the waggon employed by the pauper to remove his goods was not large enough to carry them. All the things left behind were to have been sent to *Yarmouth* on the following day, but were

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owing in respect of the premises occupied by him the said E. R.," and the expenses of selling and collecting, &c.; and, lastly, to pay the residue among the creditors becoming parties thereto in three months, rateably; with covenant by the creditors not to molest or disturb *E. R.* &c.

not

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not in fact sent until the *Thursday*. The pauper left the key of the house with his son, with a command not to give it up to the landlord till the *Michaelmas* day; the son, who had lived with his father, continued to sleep in the house, having his clothes and chest there until the *Thursday* or *Friday;* and, on the *Friday*, which was *Old Michaelmas* day, delivered the key to the landlord, and went to lodge at the house of his master, a miller residing at *Pakefield*, with whom he had boarded from the day his father left the parish. The pauper and his wife and three children continued to reside at *Yarmouth* from the 8th of *October* for several months, and did not return to *Pakefield* until a short time before they were removed to *Walpole* under the said order. The question submitted by the sessions was, whether the pauper gained a settlement in *Pakefield*.

Biggs Andrews, and *Austin*, in support of the order of sessions. The pauper gained a settlement by hiring the dwelling-house, under stat. 1 *W.* 4. *c.* 18. *s.* 1. Two objections will be made, one as to the payment, the other as to the occupation. First, the rent, to the amount of 10*l.*, was paid "by the person hiring," the pauper. It is not necessary, to satisfy the act, that the payment should be made by the very hands of the party; his property, with his assent, as shewn by the deed, and without assistance from any other quarter, satisfied the rent. Secondly, he actually occupied for a year, from *Michaelmas* day 1832 to *Michaelmas* day 1833. A party may occupy premises without actually residing; per *Patteson* J. in *Rex* v. *Willoughby* (*a*).

(*a*) Antè, p. 150, 151.

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Here the son held the key to the end of the year. Even if that were not enough, yet the absence of the pauper for the few days at the end of the year would not break the occupation, more than absence for a day or two at any other part of the term. No other occupier can be pointed out. As for the assignment of the crops, it cannot be held that the right of the assignee to enter and take the crops destroyed the occupation of the pauper; the keys, and the control of the house and premises, being with the pauper; *Rex* v. *St. Giles-in-the-Fields* (*a*). The pauper could have maintained trespass. To hold that a sale of the growing crops puts an end to the occupation of the land would be carrying the doctrine of *Rex* v. *St. Nicholas, Colchester* (*b*), and *Rex* v. *St. Nicholas, Rochester* (*c*), to an extent never yet contended for.

Manning, contrà. First, The assignee, under the deed, was the occupier, he having acted on the deed, as appears by the doctrine assumed in *How* v. *Kennett* (*d*) and *Carter* v. *Warne* (*e*); he had a right to the occupation for the purpose of selling, and might have maintained trespass. After the sale, the purchaser would be the occupier. A party who takes a lease and assigns it over cannot be said to occupy "under such yearly hiring." [*Coleridge* J. Can you call this an assignment of the lease?] In *Carter* v. *Warne* (*e*) the words "personal property" were held sufficient to pass a lease. [*B. Andrews*. The crops, on that construction, need not have been expressly assigned.] At all events, the

(*a*) Antè, p. 495. (*b*) 2 *A. & E.* 599. (*c*) 5 *B. & Ad.* 219.
(*d*) 3 *A. & E.* 659. *S. C.* 5 *N. & M.* 1. (*e*) *M. & M.* 479.

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pauper had not the undivided occupation. Neither has he paid the rent; for it does not, in effect, come from his pocket.

Lord DENMAN C. J. It seems to me that neither the requisite of occupation nor that of payment is satisfied. The assignment denuded the pauper of his right in the personal property, and gave the assignee power to enter. The pauper had, therefore, not an exclusive occupation. Again, when he had parted with all the personal property, and ceased to have a control over it, a payment out of that over which he had no control was not a payment by him.

LITTLEDALE J. There was no actual occupation under the statute. The pauper, for valuable consideration, assigned to a party who adopted the deed. And we can hardly say that a payment has been made by a party who has previously assigned over that out of which the payment is made.

WILLIAMS J. It seems to me that the pauper had not an undivided occupation after he had parted with part of the right of possession of the place where the crops were growing, and had given another person a right to enter and take them away. Then, as to the payment, at the utmost there was only a fund provided, out of which another party was to pay.

COLERIDGE J. I agree on the last point: the assignee was a trustee, only, to raise a fund out of which the payment was to be made. As to the occupation, I cannot agree that the pauper's interest was assigned

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over; but I think he had not the exclusive occupation. And this might be inferred from the language in which the facts are stated; for it is said that the pauper continued to reside *in the house*. The assignee had clearly a right inconsistent with exclusive occupation by the pauper.

Order of sessions quashed.

Wednesday, January 27th.

The KING *against* The Inhabitants of HARRINGTON.

A printed indenture of apprenticeship executed on one day, but bearing date on another, is not void by statutes 8 *Ann.* c. 9. and 5 *G.* 3. c. 46.; and a settlement may be gained by service under it.

ON appeal against an order of justices, whereby *Robert Cook*, his wife, and children were removed from the township of *Manchester* in the county of *Lancaster* to the parish of *Harrington* in the county of *Cumberland*, the sessions confirmed the order (except as to one of the children), subject to the opinion of this Court upon the following case: —

The pauper *Robert Cook* had a derivative settlement in *Harrington*, and had no settlement in his own right unless he gained one under the circumstances hereinafter stated. In *June* 1815 he was bound apprentice to *Michael M'Craa*, a shipsmith in *Workington*, for six years. The indenture was a printed form filled up, and had, at the foot of it, the notice required to be added to all such printed forms by 5 *G.* 3. *c.* 46. *s.* 19 (*a*). The indenture bore

(*a*) Stat. 5 *G.* 3. *c.* 46. *s.* 19. enacts, that all printed indentures, &c., for binding apprentices in *Great Britain*, shall have the following notice printed under the same: —

"The indenture, covenant, article, or contract, must bear date the day it is executed; and what money or other thing is given or contracted for with the clerk or apprentice, must be inserted in words at length; and the duty paid to the stamp office, if in *London*, or within the weekly bills of mortality, within one month after the execution, and if in the country, and

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bore date 18th of *June* 1813, but was not executed in fact until *June* 1815; it was properly stamped, and regular in all other respects, except as to its being antedated. The pauper gained a settlement by service under it in *Workington*, provided a settlement could be acquired at all by service under this indenture. The sessions held the indenture void; and the question for the opinion of this Court was, whether the same was void on account of its being antedated or not.

Wightman, in support of the order of sessions. The indenture was absolutely void. Stat. 8 *Ann. c.* 9. *s.* 35. enacts that the full sum given or contracted for with any such apprentice as is mentioned in sect. 32., shall be inserted in some indenture &c., which shall contain the covenants or agreements relating to the service, "and shall bear date upon the day of the signing, sealing, or other execution of the same;" upon pain that every master or mistress to whom any sum shall be given or secured for or in respect of any such apprentice, "which shall not be truly and fully so inserted and specified in some such indenture, or other writing, shall for every such offence forfeit" &c., one moiety to the crown, the other to the party who shall inform &c., at any time after the executing of any such indenture &c., or making any such contract, and within a year after the expiration

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and out of the said bills of mortality, within two months, to a distributor of the stamps, or his substitute; otherwise the indenture will be void, the master or mistress forfeit 50*l.*, and another penalty, and the apprentice be disabled to follow his trade, or be made free."

And it is enacted, that if any printer, stationer, or other person, shall sell any such indenture without such notice being printed under the same, such printer, &c. shall, for every such offence, forfeit 10*l.*

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of the time of service. An indenture not dated according to this clause is void, by the rule laid down in *Slade* v. *Drake* (*a*), that "affirmatives in statutes that introduce new laws, do imply a negative to all that is not in the purview." And the clause, if ambiguous, receives a legislative exposition from stat. 5 *G.* 3. *c.* 46. *s.* 19.

Armstrong, contrà. The statute 8 *Ann. c.* 9. *s.* 35. does not declare the indenture void if not dated on the day of execution, or otherwise framed according to the directions there given. If it had the effect of rendering an indenture void which was not properly dated, it would also avoid an indenture in which the sum given or contracted for with the apprentice was not inserted. But the legislature has not considered it as so operating, for a clause (sect. 39.) is afterwards introduced expressly avoiding indentures which are defective in the last particular. This section does not affect indentures bearing a wrong date, and its provisions cannot be imported into sect. 35 for that purpose. Stat. 5 *G.* 3. *c.* 46. *s.* 19., enacts nothing, except that a certain notice shall be added to the indenture, and that parties selling it without such notice shall be liable to a penalty. This clause has not the nature of a declaratory enactment. In 1 *Nolan's Poor Law*, 521, note (1.), it is enumerated among the provisions, subsequent to stat. 8 *Ann. c.* 9., which do not affect the question of settlement. At common law a deed may be delivered after the date; *Com. Dig. Fait*, (B 3).

Lord DENMAN C. J. It is contended that no settlement could be gained in this case, because the inden-

(*a*) *Hob.* 298.

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ture is avoided by the two acts of parliament which have been referred to. The stat. 8 *Ann. c.* 9. *s.* 35. does not declare such an indenture void; it merely enacts that the indenture of apprenticeship shall bear date on the day of execution, and imposes a penalty, if it be not properly dated. Sect. 39. enacts that for certain contraventions of the statute the indenture shall be void; and among them is one of the omissions mentioned in sect. 35. We cannot, therefore, by implication, carry on to the thirty-ninth section a class of omissions which is not expressly referred to in it. Then comes the stat. 5 *G.* 3. *c.* 46. That is an act for altering, and for further securing and improving, the stamp duties; and it requires that upon every indenture there mentioned there shall be a printed notice, telling the contracting parties that the indenture is to give information of the time when the instrument was executed, and what money or other thing is given or contracted for with the apprentice; and also stating that the duty is to be paid within a certain period after the execution of the indenture; and further that, in default of such information being furnished by the indenture, and such duty paid, the indenture will be void. But there are no words making the indenture void if it be not properly dated; and probably, in the clause just referred to, more was thought of ensuring payment of the duties than of explaining the statute of *Anne*. It is unnecessary to consider the cases (some of which are referred to in 2 *Dwarris on Statutes*, 741.), where it has been held, that an instrument declared by statute to be void is only voidable. Here there is no statute which declares that an indenture shall be void if the requisite in question be not fulfilled.

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LITTLEDALE J. The stat. 8 *Ann. c.* 9. *s.* 35. does not avoid the indenture if it be not truly dated, but only imposes a forfeiture. In sect. 39, which enumerates the omissions that shall avoid an indenture, the want of a proper date is not included. The act 5 *G.* 3. *c.* 46. *s.* 19 gives a notice in which it is said, in terrorem, that an indenture not truly dated will be void; but the statute does not make it so.

WILLIAMS and COLERIDGE Js. concurred.

Orders quashed.

Friday, January 29th.

KELLY *against* The Honourable EDWARD HENRY ROPER CURZON.

An affidavit to hold to bail, stating the defendant to be indebted to the plaintiff for money had and received by defendant for and on account of plaintiff and at his request, but not adding that it was received to plaintiff's use, is insufficient.

A RULE nisi had been obtained in this case for setting aside the capias on which the defendant had been arrested, and discharging him out of custody. The ground was the insufficiency of the affidavit to hold to bail, which stated that the defendant was indebted to the deponent, the plaintiff, in 2350*l.* "for money had and received by him the said Honourable *Edward Henry Roper Curzon*, for and on account of this deponent, and at his request," but the money was not sworn to have been received *to the use* of the plaintiff.

Alexander now shewed cause. It is sufficient if the affidavit alleges that the defendant is indebted to the plaintiff in a certain sum, and points out the cause of action: *Coppinger* v. *Beaton* (*a*). If the defendant was

(*a*) 8 *T. R.* 338.

not

not indebted to the plaintiff for money had and received, perjury might be assigned on the affidavit.

Sir *John Campbell*, Attorney-General, contrà. *Coppinger* v. *Beaton* (*a*) has been, in effect, over-ruled again and again. In the present instance, the party making the affidavit might be a surety, and, if indicted for perjury, might allege that he swore according to what he understood to be the law. After citing *Cathrow* v. *Hagger* (*b*), and *Taylor* v. *Forbes* (*c*), he was stopped by the Court.

Lord DENMAN C. J. It is perfectly clear, upon grounds similar to those stated by Lord *Tenterden*, in *Pitt* v. *New* (*d*) (which case is supported by *Reeves* v. *Hucker* (*e*)), that this affidavit is insufficient.

LITTLEDALE J. Many cases may be put in which it may be said that money was received "for, and on account of," the plaintiff; but nevertheless it may not have been received to his use. The affidavit must allege the facts which constitute the debt.

WILLIAMS J. concurred (*g*).

Rule absolute.

(*a*) 8 *T. R.* 338.
(*b*) 8 *East*, 106.
(*c*) 11 *East*, 315.
(*d*) 8 *B. & C.* 654.
(*e*) 2 *Cro. & J.* 44. *S. C.* 2 *Tyr.* 161.
(*g*) *Coleridge* J. was absent.

Friday, January 29th.

The KING *against* HENRIETTA LAVINIA GREENHILL.

Where a person supposed to be improperly in custody is brought up on habeas corpus, the Court, if there appear no ground for restraint, will order that such person be at liberty to go where he pleases, and will, if necessary, give him the protection of an officer in going. But, if the party be a legitimate child, too young to exercise a discretion, the legal custody is that of the father; and, if the mother has possessed herself of the child adversely to him, and he claims it, the Court will oblige her to deliver it up.

Nor will this rule be departed from on the ground that the father has formed an adulterous connection, which still continues, if it appear that he has never brought the adulteress to his house or into contact with his children, and does not intend to do so.

Semble, that the child would not be given into the father's custody if it appeared that in his hands it would be exposed to cruelty or to gross corruption.

ON the 23d of *October*, 1835, *Benjamin Cuffe Greenhill*, Esquire, of *Knowle Hall*, *Somersetshire*, obtained a habeas corpus, commanding his wife, *Henrietta Lavinia Greenhill*, to produce the bodies of their three children before *Patteson* J. at his house. The writ was obtained on an affidavit by Mr. *Greenhill*, stating that he had been residing with his said wife and children at *Weymouth* till the 23d of the preceding *September*, or thereabouts, when Mrs. *Greenhill*, in his absence, left the house and went to her mother's at *Exeter*, where she had ever since continued, and refused to return. That, after her departure, *September* 26th, her brother Captain *Macdonald*, at her instigation, went to *Weymouth*, broke up Mr. *Greenhill*'s establishment there, and, without his authority, took and conveyed the said children, females, aged, respectively, five years and a half, four and a half, and two and a half, to the house of Mrs. *Greenhill*'s mother at *Exeter*, where they had ever since been in the custody of Mrs. *Greenhill*, against the will of Mr. *Greenhill*; and that he, as their father, claimed the custody and possession of them as a right, which he would not in any way abuse. The children were brought to the house of the learned Judge in obedience to the writ; but

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their further attendance was dispensed with, it being stated by Mr. *Chambers*, Mrs. *Greenhill*'s uncle, that they would be at his house in the immediate neighbourhood, and would be produced in ten minutes, when it became necessary. And affidavits were put in on behalf of Mrs. *Greenhill*, in answer to that of her husband. She herself stated as follows: — The permanent residence of Mr. and Mrs. *Greenhill* was *Knowle Hall*. Mr. *Greenhill* was in the habit of leaving Mrs. *Greenhill* for short periods, during which the children were under her entire controul. In the summer of 1835, Mr. *Greenhill* arranged that they should go, with the children, to *Weymouth* for a month or two; and that Mrs. *Greenhill* and the children should proceed from thence to the house of her mother at *Exeter*, about the 1st of *October*. The object of the journey to *Weymouth* was amusement and health. They arrived there about *July* 11th, and occupied furnished lodgings. Mr. *Greenhill* had a pleasure-yacht, in which he frequently left *Weymouth* on short excursions. The last time of his leaving Mrs. *Greenhill* there was *September* 7th, when he sailed for *Portsmouth*, after which he went to *London*: and on *September* 24th she received information as to his conduct, which rendered it necessary, in her opinion, to remove immediately, with her children, to her mother's house at *Exeter*. She accordingly left *Weymouth*, and, on *September* 26th, had her children conveyed to *Exeter*. They remained under her care, at her mother's house, till *October* 27th; and she then, in obedience to the habeas corpus, brought them to *London*, where they resided, with her, at the house of her uncle, Mr. *Chambers*. Mrs. *Greenhill* further expressed her belief that, if her husband were permitted to have the custody and controul

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of the infants, their welfare and interests would be prejudicially affected thereby; and that her husband's mother, with whom it had been suggested that they might be placed, was, from circumstances which the affidavit set forth as to her temper and disposition, an improper person to have the charge of them. Mrs. *Greenhill* also stated that she had not herself done any act which could render her unworthy or unfit to have the custody of the children; and that her husband could at any time have, and had in fact had, access to them where they then were. By other affidavits it appeared that Mr. *Greenhill* had, during the years 1834 and 1835, lived in continued adultery with a Mrs. *Graham*, cohabiting with her at various lodgings in *London* and at *Portsmouth*; the intercourse at the latter place having been still carried on after the arrival of Mrs. *Greenhill* and her children at *Weymouth*; that during such cohabitation Mr. *Greenhill* and Mrs. *Graham* had at times assumed the names of Mr. and Mrs. *Greenhill*, and Mr. and Mrs. *Graham*; that in the month of *October*, in which the habeas corpus was obtained, they were living together under the latter names at a lodging in *London*; and that in that month he had acknowledged to Mr. *Chambers*, the uncle of Mrs. *Greenhill*, that the adultery was still continuing, and had refused to part with Mrs. *Graham* while uncertain of a reconciliation with his wife. There was also an affidavit that Mr. *Greenhill* had, in the same month, gone with a female to a common brothel, where it was believed they had passed the night. Mrs. *Greenhill*'s uncle deposed, from his knowledge of the "character, disposition, and conduct" of Mr. *Greenhill*, that he was not, in the deponent's opinion, a fit and proper person to have the

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care and custody of the children; that, if they were entrusted to him, there was great danger that they would not be properly educated and taken care of; and that Mrs. *Greenhill* was in all respects a proper person to have the care and custody of them. The grandmother of Mrs. *Greenhill* deposed to the same effect, and that, if the children were placed with their father, there was great probability that they would be "brought into contact with a female of an abandoned and profligate character:" and she also stated that Mr. *Greenhill*'s mother was an improper person to be entrusted with the children, being unkindly disposed both towards them, and towards Mrs. *Greenhill*.

After the suing out of the habeas corpus, and before its return, a petition, founded upon the above affidavits on behalf of Mrs. *Greenhill*, was presented to the Vice-Chancellor, praying that it should be referred to one of the Masters of the Court to report who was a fit and proper person to be the guardian of the said infant children, &c. The petition was heard, and dismissed, while the habeas corpus was depending before *Patteson* J. On the 10th of *November*, *Patteson* J., after taking time for consideration, ordered that Mrs. *Greenhill* should deliver up the children to her husband. In the then *Michaelmas* term, *November* 12th, that order was made a rule of Court. The rule was served on Mrs. *Greenhill*, *November* 12th, and the children demanded: but she refused to give them up. On the 13th a rule nisi was obtained for an attachment against Mrs. *Greenhill* for her contempt. In the same term, *November* 17th,

Wilde Serjt. moved, on behalf of Mrs. *Greenhill*, for a rule calling on Mr. *Greenhill* to shew cause why the order

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order of *Patteson* J. should not be set aside, and the rule, making it a rule of Court, discharged. The motion was grounded on an affidavit (among others) by Mrs. *Greenhill*, stating, in addition to facts which have been already mentioned, that the children had been always brought up under her personal superintendence and care, and that, without her personal attention, their health and comfort would suffer; that, according to her belief, the connection between Mr. *Greenhill* and a female of immoral character still continued; that Mrs. *Greenhill* had had two interviews with him since she came to *London* in obedience to the writ, and that in neither did he pledge himself to put an end to such connection; that, as she was informed and believed, he had taken a house for the said female for a term of years, and intended to reside with her permanently; that the children were kept under no restraint, were attended by the same nurse as when they were at *Weymouth*, and had never been withheld from their father, who, on the contrary, had been offered free access to them at all times; that Mr. *Greenhill* had always admitted the propriety of Mrs. *Greenhill*'s conduct as a wife and mother; that he would not inform Mrs. *Greenhill* how he intended to dispose of the children; that Mrs. *Greenhill* had instituted proceedings (which were then depending) in the Ecclesiastical Court for a divorce and alimony, because the conduct of her husband was such that she could not with propriety reside longer with him, and that she believed the habeas corpus to have been obtained for the purpose of affecting that suit; that she only desired permission to continue bestowing upon her children the same personal care and attention which they had hitherto received from her, and which was necessary to their welfare;

fare; and that she had always been ready and willing, and offered, and did then offer, to reside in any place, save, under present circumstances, in her husband's own house, and to act with respect to the said children, and their management, education, and disposal, precisely as her husband might dictate. She further stated that she would consent even to relinquish the custody and controul of the children, if, by the rule or other direction of the Court, she might be assured of permission to give them her personal care and attention during their tender years. It appeared by another of the affidavits now put in, that Mrs. *Greenhill*'s age was twenty-four and that of her husband twenty-eight.

Wilde Serjt., in moving for the rule, stated the proposal of Mrs. *Greenhill* to be, that she should not part with the children, but that they should be placed where her husband should appoint, she having access to them for the purpose of giving them her care and attention, subject to his directions. The question raised by these proceedings is, not whether the father's right over his children be paramount, but whether the rights of the mother are to be wholly disregarded, so that she may not claim access even to infants within the age of nurture. The law cannot require that, if a husband makes his own house unfit for his wife's residence, his children shall, therefore, be deprived of the maternal care and protection. [Lord *Denman* C. J. Has Mrs. *Greenhill* gone with the children to her husband, and made the proposal you now mention, and has it been rejected? *Patteson* J. All that appeared before me was, that she had left her husband's house, and the children in it; that her brother had gone to the house and

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brought the children away; and that Mrs. *Greenhill* had then gone with them to *Exeter*, and had afterwards said she would not deliver them up.] The place she left was only a lodging-house, taken for a limited time; and she went from thence to the place which her husband had appointed. [*Patteson* J. At any rate she went much before the time.] None of the authorities go so far as to bear out the present motion. In cases where the child has been actually in the father's possession, this Court has declined to interfere, no doubt considering its power inadequate to alter such a state of things; but those cases differ from the present; and, in a case (that of Mr. *Lytton* (*a*)) where the father had bound himself by an agreement in articles of separation to allow the mother access to the child, the Court would not suffer him to take it from the school at which it had been placed, without providing for the future access of the mother. The only instances in which the Court appears actually to have taken away the child from the mother are Sir *William Murray*'s case (*b*) and *Ex parte M'Clellan* (*c*). [*Patteson* J. In that case the child had been placed at a school by agreement between the father and mother; the mother persuaded the governess to let the child go to her for a few days, under a promise to restore it, and then kept it. I thought there was an absurdity in saying that, if the husband took the child by force, the Court would not remove it from his possession, and yet that it would not assist him in obtaining the possession, when he sought it by the legal course of a habeas corpus.] Where he actually has the custody,

(*a*) Cited in *Rex* v. *De Manneville*, 5 *East*, 222.
(*b*) Cited in *Rex* v. *De Manneville*, 5 *East*, 223.
(*c*) 1 *Dowl. P. C.* 81.

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the power of the Court is limited; where he has it not, the Court will exercise its discretion according to the circumstances. In *Rex* v. *Smith* (*a*), where a boy was brought up by habeas corpus at the instance of his father, for the purpose of having him delivered over by an aunt who kept him, the Court, over-ruling *Rex* v. *Johnson* (*b*), refused to do more than order him to be delivered out of the custody of the aunt, and inform him he was at liberty to go where he pleased. And in *Rex* v. *Sir Francis Blake Delaval* (*c*) Lord *Mansfield* states the law to be, that, "In cases of writs of habeas corpus directed to private persons, to bring up infants, the Court is bound, ex debito justitiæ, to set the infant free from an improper restraint: but they are not bound to deliver them over to any body, nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them." He then refers to the two cases in *Strange*, just cited, and a third, *Rex* v. *Clarkson* (*d*), and adds, "The true rule is, that the Court are to judge upon the circumstances of the particular case; and to give their directions accordingly." And, in the case then before the Court, in which a father had obtained a habeas corpus to bring up his daughter, Lord *Mansfield* said, that there was no reason for delivering her to her father, and the order was that she should be discharged from all restraint, and be at liberty to go where she would. In *Rex* v. *Wilson* (*e*), which came before this Court in 1829, on the application of a father, the Court referred it to the Master to see what was proper as to the

(*a*) 2 *Stra.* 982. (*b*) 1 *Stra.* 579. *S. C.* 2 *Ld. Ray.* 1333.
(*c*) 3 *Burr.* 1434. (*d*) 1 *Stra.* 444.
(*e*) See p. 645, note (*a*), post.

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custody; and, in *Rex* v. *Dobbyn* (*a*), the Court refused to let the father have the custody of the infant. The object of the writ of habeas corpus is the liberty of the party detained; and the application ought properly to come from him, *Rex* v. *Reynolds* (*b*), *Rex* v. *Edwards* (*c*); though, where the party himself is of too tender years to decide upon the custody in which he ought to be, the law vests the discretion on that subject in the father. But, where he attempts to use that discretion, not in truth for the purpose of enforcing his own rights, but to take away those of the mother, the children being within the age of nurture, and no reason being shewn for abridging the mother's rights, the Court will at least interpose so far as to leave the father such a qualified dominion only, as the circumstances require, and as may be consistent with the interests of the children themselves. The whole question is, whether the case be one in which the Court can use its discretion; and whether the rights of the husband be so far paramount to those of the wife, that she has no right to stand before the Court enforcing any claim. A rule nisi was granted.

In opposition to the rule, affidavits were put in on behalf of Mr. *Greenhill*, to the following effect: — Mr. *Greenhill*'s solicitor, Mr. *Browne*, swore that, before the issuing of the habeas corpus, he had gone to Mrs. *Greenhill*, at *Exeter*, with Mr. *Greenhill*'s sanction, for the purpose of effecting a reconciliation or arrangement, which, however, he had been unable to bring about, and had ultimately demanded, while at *Exeter*, that the children should be placed under his protection to be taken to *Knowle Hall*; that Mrs. *Greenhill* refused

(*a*) See p. 644, note (*a*), post. (*b*) 6 *T. R.* 497.
(*c*) 7 *T. R.* 745.

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this, and the habeas corpus afterwards issued: that Mr. *Greenhill*, in his communications with the deponent, had evinced great affection to the children, and that they, in an interview which the deponent had witnessed between them and their father, had shewn a strong attachment to him: that, upon the service of the rule of Court of *November* 10th, for the delivery of the children by Mrs. *Greenhill*, she had refused to give them up, and expressed her determination not to live again in the same house with her husband: and that she had asked him what he meant to do with the children, to which he had replied that he should take them to *Knowle*, and that she might see them whenever she pleased. Mr. *Greenhill*, by another affidavit, denied that any arrangement had been made with his consent for Mrs. *Greenhill* to go from *Weymouth* to *Exeter*. He further stated that, in the beginning of *October* last, when informed of his wife's reasons for leaving *Weymouth*, he had expressed to her brother and uncle his contrition for what had passed, and had offered, if she would forgive him, to live with her wherever she wished, and to give up his intimacy with Mrs. *Graham*, and that he had made other attempts at reconciliation, without success. That the children, if taken out of his custody, would lose materially by family arrangements, which, to his knowledge and belief, would essentially affect their future interests: that his wife had no means of supporting them; that the children, if separated from him, would, as he believed, be brought up in detestation of him; and that his mother was a very proper person to be entrusted with them: that he had (before Mr. *Browne* went to *Exeter*) proposed to Mrs. *Greenhill*'s attorney that she should leave her mother's house and

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live somewhere in or near *London*, in which case he had offered that she might have the children under her care, but this had not been acceded to: that he never contemplated for a moment depriving his wife of the privilege she had, as a mother, of seeing her children, and had repeatedly expressed himself to her to that effect: that Mrs. *Graham* had never seen either of the children or Mrs. *Greenhill*, nor had he ever taken either of the children near Mrs. *Graham*'s residence, or Mrs. *Graham* to *Knowle Hall* or any other place where his children or wife were, nor had he entertained the thought of bringing his children or wife in contact with Mrs. *Graham*, having always loved his children, and been loved by them, with the warmest affection: and that he had never given his wife occasion to complain of any unkindness or want of affection in him towards them: that it was his intention to take them to *Knowle*, his own residence, where he proposed they should reside under the care of his mother, and where he had always been ready and willing that his wife should have free access to them, as he had frequently told her. Upon these affidavits, *Talfourd* Serjt., in the same *Michaelmas* term (*November* 24th), was partly heard in opposition to the rule; but, the Court suggesting that some agreement might perhaps be come to, the rule was enlarged to this term. From affidavits subsequently sworn by, and on behalf of, Mr. *Greenhill*, it appeared that Mrs. *Greenhill* had left Mr. *Chambers*'s house with the children; that Mr. *Greenhill* had since made unsuccessful attempts to discover where they were, and that, from information he had obtained, he believed that Mrs. *Greenhill* had taken them with her out of the kingdom.

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Sir *John Campbell* Attorney-General, *Talfourd* Serjt. and *Wightman*, now shewed cause against the rule for setting aside the order of *Patteson* J.

The arguments urged against the rule in this and the preceding term were as follows: — The legal power over infant children is in the father, the mother has none; 1 *Bla. Comm.* 453. It has been held, in the case of removal of paupers, that a bastard child, within the age of nurture, is not to be separated from the mother (*a*); but *Rex* v. *De Manneville* (*b*) shews that the principle of that ruling does not extend to the case of legitimate children, and that the custody of them belongs to the father. The doctrine of that case was recognised in *Ex parte M'Clellan* (*c*), and in *Ex parte Skinner* (*d*), where *Best* C. J. (at the bar) having, as referee, then made an order, by consent of the parents, that the child should be placed with a third person, and the father having taken it from that person, the Court of Common Pleas held that they had no authority to interfere. In the cases which have been cited, of *Rex* v. *Smith* (*e*), and *Rex* v. *Sir F. B. Delaval* (*g*), where the Court refused to do more that set the infants free from restraint, they were of sufficient age to exercise a choice as to the hands in which they should be: and, in the latter case, the Court, at the time of discharging the infant, suspected the father of being party to a conspiracy against her. In *Rex* v. *Johnson* (*h*) the reason assigned for delivering the child to the guardian appointed by her father was, that she was

(*a*) See *Rex* v. *Hemlington*, *Cald.* 6. Note [2] to *Simpson* v. *Johnson*, 1 *Doug.* 9. and *Ex parte Ann Knee*, 1 *New Rep.* 148.

(*b*) 5 *East*, 221.

(*c*) 1 *Dowl. P. C.* 81.

(*d*) 9 *B. Moore*, 278, where many cases on the subject are referred to.

(*e*) 2 *Stra.* 982.

(*g*) 3 *Burr.* 1434.

(*h*) 1 *Stra.* 579. *S. C.* 2 *Ld. Raym.* 1333.

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too young to judge for herself. *Blisset's Case* (*a*) is the only one reported, in which the Court has directly taken upon itself to over-rule the father's claim where the infant was too young to form a choice. In *Ex parte Skinner* (*b*) *Best* C. J., after observing that the Court of King's Bench, on applications of this kind, generally "refer the parties to a Master in Chancery, who may ascertain whether there be sufficient property to provide for the support of the child, or whether it might be made a ward of that Court, or he might appoint a guardian to take care of it," adds, "But the Court of Chancery has a jurisdiction as representing the King as *Parens Patriæ*, and that Court may accordingly, under circumstances, control the right of a father to the possession of his child, and appoint a proper person to watch over its morals, and see that it receive proper instruction and education." Here no ground exists for such an interference. It cannot be contended that any unkindness is to be feared on the father's part. The power of separating children from the father on account of immorality in him, lies in the Court of Chancery, for reasons which are discussed by Lord *Eldon* in *Wellesley* v. *The Duke of Beaufort* (*c*). But, supposing that such a jurisdiction could be exercised by this Court, there is no ground for coming to a different conclusion from that which the Vice-Chancellor has arrived at in the present case on the same statement of facts. In *Wellesley* v. *The Duke of Beaufort* (*c*) (which however goes beyond any previous case), very gross misconduct was imputed to the father; he had harboured an adulteress

(*a*) *Loffi's Rep.* 748. (*b*) 9 *B. Moore*, 278.
(*c*) 2 *Russ. Rep.* 1.

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in his own residence; and the separation between him and his children had originally begun with his own deliberate consent. Here, the adulteress has never been brought to the father's house, nor into contact with the children; and, in such a case, adultery is not a sufficient ground for separating the children from their father: *Ball* v. *Ball* (*a*). Nor was there in the present case any consent by Mr. *Greenhill* to a removal of the infants out of his control. Assuming that Mrs. *Greenhill's* journey to *Exeter* was conformable to a previous arrangement with him (which is not admitted), he had consented only to their going there on a visit, not to their being altogether withdrawn.

Sir *W. W. Follett* and *J. Henderson*, contrâ. It is not contended that this Court should assume the power of the Lord Chancellor to separate children from their father, on the ground of immorality in him. But, they being in the mother's custody, and of a tender age, the Court will hesitate to enforce an order, the effect of which must be, not only that they shall be delivered to the father, but that the mother shall have no means of superintending, or even of insisting upon access to them. For in *Ball* v. *Ball* (*a*) the Vice-Chancellor did not even grant an order that the mother should have "access to her daughter at all convenient times." No precedent has been cited in support of the exercise of authority required by Mr. *Greenhill*. The general proposition, that the father has a right to the custody of his children, is not disputed on the part of Mrs. *Greenhill*; nor is it contended that the mother can

(*a*) 2 *Sim.* 35.

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apply for a habeas corpus to take the children from the father: but the question here is, the children being out of his hands, what order the Court will make, if any, for their being delivered to one party or another. The earliest case bearing on this subject is] *Rex* v. *Clarkson* (*a*), where a party assuming to be the husband of a female obtained a habeas corpus for the purpose of having her delivered to him; but the Court would interfere no further than to see that she was under no restraint, and was not intercepted in returning to her guardian's house, whence she had come. The subsequent cases as to children, *Rex* v. *Johnson* (*b*), *Rex* v. *Smith* (*c*), *Rex* v. *Sir F. B. Delaval* (*d*), shew that the Court is at least not bound to make the order which it is now sought to enforce, at a father's instance, but will exercise a discretion, according to the circumstances. Without controverting the doctrine laid down in *Rex* v. *De Manneville* (*e*), it is sufficient to say that the case is no authority for the present order. In *Ex parte M'Clellan* (*g*) the application was for the purpose of restoring a child, not indeed to the father himself, but to a schoolmistress with whom he had placed her, and from whom she had been surreptitiously taken by the mother. That case merely shews that the Court will restore a child improperly taken from under the father's control; and there no such difficulty appeared, as in the present instance, respecting the mother's access. *Ex parte Skinner* (*h*) and *Ball* v. *Ball* (*i*) were cases in which the father had the actual controul over the child, and the mother sought

(*a*) 1 *Stra.* 444.
(*b*) 1 *Stra.* 579. *S. C.* 2 *Ld. Raym.* 1383.
(*c*) 2 *Stra.* 982.
(*d*) 3 *Burr.* 1434.
(*e*) 5 *East*, 221.
(*g*) 1 *Dowl. P. C.* 81.; and see p. 630. antè.
(*h*) 9 *B. Moore*, 278.
(*i*) 2 *Sim. Rep.* 35.

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to interfere with that controul. In the cases of illegitimate children, *Rex* v. *Soper* (*a*), *Rex* v. *Hopkins* (*b*), it has been held that they ought to be in the mother's custody during the time of nurture. The considerations admitted in those cases ought to weigh with the Court in the case of legitimate children, where the mother actually has them in her care, and where it is the father's fault that they cannot be with both parents. If the Court think that the order of *Patteson* J. is one which a judge was not bound to make, they will not uphold it under the circumstances. Mrs. *Greenhill* is willing to abide by any direction of the Court which may leave her access to the children. [Lord *Denman* C. J. The children are not in Court; nor have we any certainty that the order we might make would be complied with.] Their presence is not necessary for the purpose of this application; but the order would be obeyed.

Lord DENMAN C. J. As, unfortunately, the attempts to reconcile the interests of these parties have failed, we are bound to pronounce our judgment upon the application before us. There is, in the first place, no doubt that, when a father has the custody of his children, he is not to be deprived of it except under particular circumstances; and those do not occur in this case; for, although misconduct is imputed to Mr. *Greenhill*, there is nothing proved against him which has ever been held sufficient ground for removing children from their father. If we look strictly at the evidence, this will, I think, be found a case falling within the general rule just stated, with respect to the custody, for, when

(*a*) 5 *T. R.* 278. (*b*) 7 *East*, 579.

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the children were in a house rented by the father, and in the charge of those with whom he had appointed that they should be, the mother's conduct in causing them to be removed was equivalent to taking them out of his custody: and, if so, then, ex concessis, he has a right to claim that they shall be restored. But I think that the case ought to be decided on more general grounds; because any doubts left on the minds of the public as to the right to claim the custody of children might lead to dreadful disputes, and even endanger the lives of persons at the most helpless age. When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody. The only question then is, what is to be considered the proper custody; and that undoubtedly is the custody of the father. The Court has, it is true, intimated that the right of the father would not be acted upon where the enforcement of it would be attended with danger to the child; as where there was an apprehension of cruelty, or of contamination by some exhibition of gross profligacy. But here it is impossible to say that such danger exists. Although there is an illicit connection between Mr. *Greenhill* and Mrs. *Graham*, it is not pretended that she is keeping the house to which the children are to be brought, or that there is anything in the conduct of the parties so offensive to decency as to render it improper that the children should be left under the control of their father. And he promises the same conduct with respect to them for the future. The present

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sent rule was not granted because the Court entertained much doubt, but from a desire to avoid increasing the misfortunes of this family. It may be that a modified order, if we made it, would be obeyed by Mrs. *Greenhill;* but I do not feel that we should be justified in making such an order: and, the question now being whether or not the order of my brother *Patteson* should be obeyed, I am of opinion that this rule must be discharged.

LITTLEDALE J. I am of the same opinion. The practice in such cases is that, if the children be of a proper age, the Court gives them their election as to the custody in which they will be; if not, the Court takes care that they be delivered into the proper custody. If this were a case in which the father and mother disagreed as to the disposal of the children, and they were brought from a distant place in the charge of some other person, and each of the parents appeared before the Court, and claimed the custody, there is no doubt that the Court would give it to the father; the mother's application would not be attended to. Here the case is stronger; the children were, in effect, in the custody of the father, in a place selected by him; they have been removed, and he only seeks to bring them back. On the question which comes before us, whether or not the learned Judge's order should be set aside, I think we have here no right (and I do not say that we should have it in any case) to make an order about access to the children or interference with them. We can only discharge the rule.

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WILLIAMS J. In this case, as it came before my brother *Patteson*, he was bound to decide, in point of law, with whom the custody of the children should be. In general, where the party brought up by habeas corpus is competent to exercise a discretion on this point, the Court merely takes care that the option shall be left free. In *Rex* v. *Sir F. B. Delaval* (*a*) the party was of such an age; and the Court acted accordingly. But where the age is not such as to allow the exercise of a discretion, and there is a controversy as to the custody, the Court must decide; and here the learned Judge, having no doubt of the law (and I accede to his view of it), made the order in question, giving the custody to the father. Then is there any thing shewn which can induce us to suspend or set aside that order? It has been held (*b*) that the fact of a father having formed an improper connection is not of itself sufficient reason for separating his children from him. The same question was before my brother *Patteson*, and is now before us for reconsideration. The right is in the father, and must take effect.

COLERIDGE J. The single question before the Court is, whether or not this order shall be discharged. It is important to consider the circumstances under which the order was made. A habeas corpus issued, and was obeyed. The mother and children were before the learned Judge; but it was then arranged that, during the future attendance, the children's presence should be dispensed with. There was not, therefore, any thing

(*a*) 3 *Burr.* 1434. (*b*) *Ball* v. *Ball*, 2 *Sim.* 35.

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special in the order ultimately made; it was only what the learned Judge might have said verbally to the father if the children had been in attendance with the mother, "You are entitled to the custody of these children." The rule, then, is to be considered upon purely legal principles. A habeas corpus proceeds on the fact of an illegal restraint. When the writ is obeyed, and the party brought up is capable of using a discretion, the rule is simple, and disposes of many cases, namely, that the individual who has been under the restraint is declared at liberty; and the Court will even direct that the party shall be attended home by an officer, to make the order effectual. But, where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that, where the legal custody is, no restraint exists: and, where the child is in the hands of a third person, that presumption is in favour of the father. But, although the first presumption is that the right custody according to law is also the free custody, yet, if it be shewn that cruelty or corruption is to be apprehended from the father, a counter-presumption arises: that, however, is not raised here. The case, as it comes before us, is the same as if the parties, with the children, were on the floor of the Court, and we had to pronounce what was the rightful custody. The rule, therefore, must be discharged.

Rule discharged.

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The *Attorney-General* then moved that the rule for an attachment might be made absolute; and, no argument being offered in opposition,

The rule was made absolute; but it was ordered that the attachment should lie in the office for a month (*a*).

(*a*) The reporters are indebted to Mr. *Dealtry* for the following notes of two cases referred to in the argument of *Wilde* Serjt., antè, pages 631, 632.

The KING *against* DOBBYN.

A father claiming from his wife the custody of their legitimate infant child on habeas corpus, the Court, on a representation by the wife of his profligacy and cruelty, referred it to a barrister to determine as to the proper custody for the child, the wife (who was in contempt for disobeying the writ), and the husband, consenting to abide by such determination.

IN *Michaelmas* vacation, 1817, Lord *Ellenborough* issued a summons, at the instance of *William Augustus Dobbyn*, calling upon *Maria Philippa Dobbyn*, his wife, to shew cause why a writ of habeas corpus should not issue to bring before him the body of *Philippa Dobbyn*, their daughter, aged six years, for the purpose of her being delivered over to the father. The summons was attended before Mr. Justice *Holroyd*, who ordered the writ to issue.

The defendant having neglected to make any return to the writ, Lord *Ellenborough* issued his warrant pursuant to the statute 56 G. 3. c. 100., to apprehend the defendant, in order that she might find bail for her appearance in the Court of King's Bench on the first day of the following *Hilary* term, to answer the contempt. She was apprehended under the warrant, and entered into a recognisance to appear accordingly.

On the first day of *Hilary* term she appeared in Court, and was asked whether she would undertake to appear before a Judge at chambers, and bring the said *Philippa Dobbyn* with her, which she declined to do; whereupon she was examined upon interrogatories, and reported in contempt. The reasons alleged by her for not giving up the child were, that the time of the father was principally devoted to the gaming table and the society of women of infamous character; that he, having attempted the life of the defendant, was likely to do the same to the child; and that he was of a brutal disposition; that he had beat defendant with a stick, and desired the woman with whom she lived to turn her out of doors, declaring she was not his wife, but his discarded mistress; that on one occasion, on his returning from the gaming table in a dreadful temper, he accused the defendant of inconstancy; she protested her innocence, but nevertheless he nearly strangled the defendant, and inflicted on her several violent blows, and exclaimed, "she was dead, he had murdered her;" that she exhibited articles of the peace against him, and

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and he was bound over to keep the peace, in 2000*l.*; that he endeavoured to procure a divorce, but could not succeed, though she did not oppose it; that, although he could see the child whenever he wished it, he had only sent for her twice within the last three years and a half, when she was immediately sent; that she believed his only motive in claiming the child was a wish to give her, Mrs. *Dobbyn*, pain, and not affection to the child.

Easter term, 1818. The defendant was examined upon interrogatories, and reported in contempt. By consent, sentence was postponed till the next term. And it was referred to Mr. *Taunton* to determine in whose custody *Philippa Dobbyn* should be placed, or remain for the present to abide his further order. And it was also referred to Mr. *Taunton* to inquire into all matters in difference between the prosecutor and the defendant, touching the said *Philippa Dobbyn*, and to determine in whose custody the said *Philippa Dobbyn* should be permanently placed, and to regulate the access to be had by the prosecutor and defendant to the said *Philippa Dobbyn*, if he should adjudge it proper that both parents should have such access. And to make such further order respecting her as he should think fit, the prosecutor and defendant undertaking (by the rule) to pay obedience to such orders.

The KING *against* WILSON.

Infant child in custody of the mother, brought up by habeas corpus at the father's instance. Ordered that the child remain with the mother; the father's access to be regulated by the Master.

HILARY term, 1829. Wife and child, daughter of three years old, brought up by habeas corpus sued out by the husband; the wife was asked if she was under any restraint; and she was told she was at liberty to go where she pleased; and it was referred to the Master to determine at what time and in what manner, and under what circumstances, the father should have access to the daughter; she in the mean time to remain with the mother.

Friday, January 29th.

HOLLINGSWORTH *against* BRODRICK.

HOLLINGSWORTH *against* COLLINSON.

Two actions having been brought by the same plaintiff against different defendants, on the same policy of insurance, the Court consolidated them, after a declaration had been delivered in one, and an appearance entered in the other, at the instance of the defendant in the latter action, though the plaintiff objected.

THESE were two of forty-eight actions brought by the same plaintiff on the same policy of insurance against several defendants. The policy was on the ship *Angerstein*, and all the actions were on the same loss. After appearances were entered, and before any declarations were delivered, a summons to consolidate the actions was served on the plaintiff. On the hearing at chambers, *Coleridge* J. referred the matter to the full Court, and, in the mean time, ordered that the proceedings in all but one action should be stayed. A declaration had been subsequently delivered in *Hollingsworth* v. *Brodrick*. *R. V. Richards*, in this term, obtained a rule calling on the plaintiff to shew cause why the two "actions should not be consolidated, or why the proceedings in the second mentioned cause should not be stayed."

From the affidavits in answer, it appeared that the expected defence was unseaworthiness; and that the premiums paid were at the rate of forty per cent., to return in proportion to the premiums currently paid on the voyages the ship might make during the time mentioned in the policy (which was twelve months, commencing 1st *March*, 1834); and that no return had been made by the defendants or any of the subscribers. It further appeared that an action had been brought by the plaintiff, in the Common Pleas, on a policy on freight, upon the same ship, on the same loss; in which the defendant

defendant had pleaded unseaworthiness, and had paid the premium into court.

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Maule showed cause in this term (*January* 28th (*a*)). It may be observed that this rule introduces a term, "consolidated," which has not been used before in these applications. It has hitherto been usual to express, at length, the intended effect: namely, that the other actions shall be stayed, on the consent of the defendants (not the plaintiff) to be bound by the event of the cause tried. And here the application is, to consolidate before declaration: but the practice has always been to refuse to consolidate till issue joined. [*Coleridge* J. It was stated to me that, since the new rules, many judges have allowed a consolidation after declaration, and before issue joined.] In the late cases of *Doyle* v. *Anderson*, and *Doyle* v. *Stewart* (*b*), an application was made for a consolidation rule to bind the plaintiff; and the hardship arising under the new rules, from the increase of expense to defendants, was pressed upon the Court in support of the application; but the Court refused to grant it, although the circumstances there were strongly in favour of the defendants. And that which judges have done by consent of parties constitutes no precedent for cases where the plaintiff resists. The declaration may be differently framed against different parties. When the general issue was almost invariably the defence, still the Courts withheld the rule till they saw what issue was joined, and whether it applied to all the cases: and, now that the defences are to be specially

(*a*) Before Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* Js.
(*b*) 1 *A.* & *E.* 635.

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pleaded, the principle applies still more strongly. Besides, the hardship arising to the defendants, from the length of the several declarations, is much lessened, now that the declarations contain only one count. It is known that the defence in this case is unseaworthiness. Supposing that to be pleaded, the defendants would be required to pay into Court the premium which they have received, as has been done in the action in the Common Pleas; but the plaintiff would lose this security if the rule were to be made absolute as prayed.

R. V. Richards, contrà. The law as to consolidating actions has gradually been engrafted on the practice of the Courts. The rule formerly was, to stay the proceedings unless the plaintiff consented to consolidate. It is true that, until the late rules of Court were made, the consolidation never took place before plea pleaded. That, however, was thought a hardship; and the practice at chambers has latterly been to consolidate at an earlier stage. The defendants are ready to submit to any terms which the Court may think necessary for giving the plaintiff the full and immediate benefit of the judgment in the first action, against the remaining defendants. [*Maule*. There will be a difficulty as to the judgment, if the consolidation be made before declaration. *Littledale* J. Perhaps the parties might agree that the same declaration should be considered as delivered in all the cases.] The form might be easily settled hereafter. The proceeding in the Common Pleas, which has been cited, took place in an action on a policy upon freight; this is on a time policy. The rule may perhaps be different in the two cases.

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Lord DENMAN C. J. We will confer with the other Judges.

Cur. adv. vult.

Lord DENMAN C. J. now said, We think the consolidation ought to take place.

Rule absolute (*a*).

(*a*) By consent, the following rule was drawn up. "It is ordered that all proceedings in the last mentioned cause be stayed, until the trial of the first mentioned cause, the defendant in the last mentioned action hereby undertaking to be bound and concluded by the verdict found in the first action, if such verdict shall be to the satisfaction of the Judge who may try the same. And it is further ordered that, if the defendant pays the premium into Court in that action, the other defendant shall, within one week after such payment, pay the premium into Court in the other action under this rule, and that the plaintiff be at liberty to take the same out of Court; and, if he elects to accept such premiums in satisfaction of such action, that he be at liberty to proceed to tax his costs at any time either before or after the verdict in the first mentioned action. And it is further ordered that, if the verdict be found for the plaintiff in the first mentioned action to the satisfaction of the Judge before whom the same may be tried, then the defendant in the other action shall pay to the plaintiff the amount of the sum assured by him, or such proportion thereof as the verdict recovered bears to the sum assured by the defendant in that action, together with the costs up to that time, to be taxed by the Master, within a fortnight after the taxation of the plaintiff's costs in the action tried. And it is further ordered that, if the money be not so paid, the plaintiff shall be at liberty to file a declaration and sign judgment by default for the amount in the action in which the money is neglected to be paid, unless a judge shall otherwise order. And it is further ordered that, if the defendant in the first mentioned action to be tried pays the premium into Court, and the verdict is found for the defendant, the plaintiff, nevertheless, shall be at liberty to tax his costs, sign judgment, and issue execution in the other action for such costs, unless the defendant pays the same within a fortnight after the verdict in the action which shall be so tried as aforesaid."

Friday, January 29th.

The KING *against* The LIVERPOOL and MANCHESTER Railway Company.

By the *Liverpool* and *Manchester* Railway Act it was provided that the purchase money to be given by the Railway Company for lands, &c., taken, and the compensation they were to make for damage to lands, &c., and for detriment, injury, damage, loss, inconvenience, or prejudice, sustained by owners and occupiers, should be ascertained, in case of disagreement, by a jury, who should assess compensation for the damages to be sustained by any person being owner or occupier of or interested in such lands, &c., for the detriment, &c., which should accrue to him by reason of the making of the railway, or of the execution of the company's power; such damages to be settled distinctly from the value of the lands. And every tenant at will, lessee for a year, and other person in possession of lands, &c., through which the railway was intended to pass, not having any greater interest than as tenant at will or lessee for a year, was to give up possession at six months' notice; but, where such tenant was required to give up possession before the expiration of his term or interest, the company were to make compensation for the value of the unexpired term or interest, to be settled, if necessary, by a jury.

THE above company was incorporated by stat. 7 *G.* 4. *c.* xlix. (local and personal, public), and empowered thereby to make a railway from *Liverpool* to *Manchester*, and to take lands for the purposes of the act. Sect. 45 enacts that all bodies politic, &c., before capacitated to sell, and the owners and occupiers of any lands, tenements, &c., through which the company's works are intended to be made, "may accept and receive satisfaction for the value of such lands, tenements, and hereditaments, and also compensation for the damages to be sustained in making or completing the said works," and "for and on account of the detriment, injury, damage, loss, inconvenience, or prejudice which may be sustained by such bodies," &c., or other persons, in such sums as shall be agreed upon, the amount of satisfaction and compensation to be settled, in case of disagreement, by a jury; such jury to be summoned by the sheriff on warrant from the company.

The company gave notice as above, to a party whose lease had been several times renewed for terms of seven years, and whose landlord, at the time of the last renewal, had declined to renew for fourteen years, but assured the tenant that he would not be turned out at the end of the seven. The tenant afterwards laid out money in improvements. During the seven years the landlord sold his reversion to the company, and died:

Held, that the tenant had no interest for which the company were bound to make compensation under the act.

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Sect. 47 enacts that, in ascertaining the sums to be paid for the purchase of any lands, &c., "the jury shall also ascertain and assess the compensation and satisfaction to be made by the said company for any damages which shall or may at any time or times hereafter be sustained by any body or bodies," &c., "or by any person or persons respectively, being owner or owners or occupier or occupiers of, or interested in such lands, tenements, or other hereditaments, for or by reason of the severing or dividing the same from other lands," &c., belonging to such bodies, persons, &c., "and for or on account of the detriment, injury, loss, and damage, or prejudice which shall or may accrue to or be sustained by such body or bodies" &c., "owner or owners, or occupier or occupiers, or other person or persons interested in such lands, tenements, or other hereditaments, or any of them, by reason of the making, using, repairing, or maintaining the said railway or tramroad, and other works and conveniences belonging thereto, or by reason or means of the execution of any of the powers given to the said company;" such damages and compensation to be settled separately and distinctly from the value of the lands, &c., to be taken and used as aforesaid.

Sect. 48 enacts that the said juries shall settle, "what shares and proportions of the purchase money or compensation for damages which shall be assessed as aforesaid shall be allowed to any tenant or other person or persons having a particular estate, term, or interest in the premises, for such his, her, or their interest or respective interests therein." Sect. 55 vests the lands in the company on payment or legal tender of the purchase-money or compensation agreed upon or assessed.

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Sect. 56 enacts that every tenant at will, lessee for a year, and other person in possession of lands, &c., through which the railway is intended to pass, not having any greater interest than as tenant at will or lessee for a year, or from year to year, shall deliver up possession to the company at the expiration of six calendar months next after such notice as is there directed (whether such notice be given with reference to the time when the holding commenced, or not, and whether it be given before or after the time of the purchase by the company), or at such time as shall be required after the expiration of six calendar months; and, in case of refusal, it shall be lawful for the company to issue their precept to the sheriff to deliver possession, which he is by the same section required to do.

Sect. 57 is as follows: — "Provided also, and be it further enacted, that where any such tenant or lessee shall be required to deliver up the possession of any premises so occupied by him to the said company, or to any person or persons authorised by them to take possession thereof as aforesaid, before the expiration of the term or interest of such tenant or lessee as aforesaid in the said premises, the said company shall and they are hereby directed to make or tender unto such tenant or lessee, before they shall issue their precept or precepts to the sheriff to give possession of the lands and premises in the occupation of such tenant or lessee as hereinbefore mentioned, satisfaction or compensation for the value of his unexpired term or interest in the said premises;" which satisfaction, &c., in case of difference, is to be ascertained in the same manner as any other satisfaction or compensation for lands, &c., to be made and assessed under this act.

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By stat. 2 *W.* 4. *c.* xlvi., local and personal, public, for enabling the company to make a branch railway, &c., it was enacted that the powers, directions, &c., of the first mentioned act, and of subsequent ones relating to the original railway, should be applicable and effectual for carrying the new act into execution. Certain premises, referred to in the act as intended to be taken and used, were described in a schedule; and among them were those now in question. The act received the royal assent *May* 23d, 1832.

In *Michaelmas* term last, a rule nisi was obtained for a mandamus to the company to issue their warrant for summoning a jury, pursuant to the first-mentioned act, for the purpose of assessing compensation and satisfaction to *William Bathe* and *Benjamin Wraith* for the detriment, injury, loss, damage and prejudice accruing to, and sustained and to be sustained by them, by reason of their premises situate &c. (on the line of the branch railway) being required to be taken, and taken, for the purposes of that act, and of the act for making a branch railway. The grounds of motion were as follows: —

Wraith, in 1804, took a lease of the premises from *Benjamin Bromfield* for seven years. At the expiration of the term he took from *Bromfield* a new lease for seven years of the same property, with some additional premises, at an advanced rent. He carried on business there as a manufacturer of plaster of *Paris*, till 1816, when he was obliged to discontinue it, and his interest in the premises was sold for 400*l.* to his son and *Bathe*, who carried on the business there in partnership till 1819. The son then withdrew, and *Wraith* entered into partnership with *Bathe*, and continued the business with

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with him on the same premises till the time of this application. The lease was renewed twice, after 1816, by *Bromfield*, at the same rent; the last renewal was for seven years from *February* 2d, 1828, by indenture of *February* 1st, made between *Bromfield* and *Bathe*. The last renewal was negotiated by *Wraith* on behalf of his partner and himself. *Bromfield* at first agreed to grant a term of fourteen years, and a lease was engrossed accordingly; but he then objected to granting a lease for more than seven years, at the same time assuring *Wraith* and his partner that they would not be turned out at the end of the term: and they, confiding in this assurance, took a renewal for seven years. In the same confidence they expended above 300*l.* upon the premises after the renewal; part of the amount in 1832 and 1834. They had also laid out a considerable sum upon them, from 1816 to 1828. In or about 1833, the company contracted and agreed with *Bromfield* for the purchase of his reversion in the premises. On the 19th of *August* 1834, the company gave *Bathe* notice to deliver up the premises to them at the expiration of six calendar months. *Bathe* and *Wraith*, in *November* 1834, applied to the company for compensation, or that a jury might be summoned; but the company refused to comply with either demand, inasmuch as the lease would expire on the 2d of *February* 1835. *Bromfield* died in *August* 1834, having conveyed his reversionary interest to the company. *Wraith* in his affidavit, on which the rule was obtained, stated his belief that, if the act had not been passed, the premises would not have been sold by *Bromfield*, and would not have been wanted for any purpose but that of carrying on the business of the

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then lessees, or a similar one, and that the lease would have been renewed on advantageous terms.

Wightman in this term (*a*) shewed cause. The parties making this application have probably relied upon the cases in which writs of mandamus were granted against *The Hungerford Market Company; Ex parte Farlow* (*b*), and *Rex* v. *The Hungerford Market Company, Ex parte Still* (*c*), and *Ex parte Gosling* (*d*). But those cases turned upon the construction of a very peculiar clause, section 19, in the *Hungerford* Market Act, to which the Court felt it necessary to give some operation. In the acts now before the Court no such clause is found. Sect. 47 of stat. 7 *G.* 4. *c.* xlix. does not extend so far; and the interests contemplated in sect. 56 and 57 must be definite legal interests. *Bromfield*, on whose supposed assurance of a renewal these claimants rely, was dead when the compensation was demanded. They had notice, in *May* 1832, by the schedule to stat. 2 *W.* 4. *c.* xlvi., that their premises would probably be required by the company.

Kelly, contrà. The Court will construe an act of this kind liberally in favour of the claimants. In *Rex* v. *Hungerford Market Company, Ex parte Gosling* (*d*), the probability of the renewal of a lease was held to be a subject of compensation, though there was no covenant for renewal. The nineteenth section of the act there contained the word "occupiers," and their interest was contradistinguished from that of termors losing part of

(*a*) *January* 28th. The case, after being partly heard, stood over to the next day.

(*b*) 2 *B.* & *Ad.* 341. (*c*) 4 *B.* & *Ad.* 592.

(*d*) 4 *B.* & *Ad.* 596.

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their term. Sect. 56 of the present act, after mentioning tenants at will and lessees for a year, provides for any "other person in possession." Sect. 48 provides for distributing the purchase money or compensation to the tenant "or other person or persons" having a particular estate or interest. Sect. 45, after speaking of persons capacitated to sell, and owners, adds, "occupiers:" and the words "detriment, injury, damage, loss, inconvenience, or prejudice," are sufficient to cover this claim. Sect. 47, besides owners and occupiers, adds, "interested in such lands, tenements," &c. In order to satisfy all these words, persons having interests not strictly legal must be included.

Lord DENMAN C. J. It certainly requires very comprehensive words to include such an interest as this, if interest it be. It is merely a hope of renewal on the old terms, which, if there has been an improvement, were not likely to be granted, where there would have been a competition. This is different from the case of a sale, and also from the case under the *Hungerford* Market Act, where the words antecedent to "good will" had exhausted the legal interests.

LITTLEDALE J. The words there were extensive enough; but here they are not so.

WILLIAMS J. The words in the forty-fifth section, "detriment, injury," &c. are so placed in the clause as to be of no avail to the argument for the claimants. They shew only what the compensation is to be given for, when the premises are to be the subject of compensation at all: but we must collect from other parts whether

whether these premises are so; and in my opinion they are not. 1836.

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COLERIDGE J. concurred.

Rule discharged.

The KING *against* ARNOLD.

Saturday, January 30th.

A RULE was obtained in this term, calling on *Thomas Arnold*, town clerk of the borough of *Poole*, to shew cause why a mandamus should not issue, commanding him, at seasonable hours and on payment of the proper fees, to permit *Samuel Colborne Scott* and *John Lankester*, two of the burgesses of the said borough, either together or apart, to have the sight and inspection of all the voting papers delivered at the election held on the 26th day of *December* last, of councillors for the said borough, and which had been deposited with the said *T. A.* as such town clerk, and also to permit the said *S. C. Scott* and *J. Lankester*, and each of them, either together or apart, to take copies or extracts of such voting papers or any of them or any part of them, and to compare the same with the originals thereof, at their own proper costs and charges.

Semble, that, under the Municipal Corporation Act, 5 & 6 *W.* 4. *c.* 76. *s.* 35., the town clerk is not compellable to allow two burgesses at once to inspect the voting papers deposited with him after an election of town councillors, or to give more than one of the papers to one person at the same time; but that he is bound to allow any burgess, who brings a list of his own, to compare it with the papers produced by the town clerk, and mark it according to what he finds there.

The rule was obtained on affidavits by *Scott* and *Lankester*, stating that, the mayor having, on the 28th of *December*, declared certain persons to be elected councillors, *Scott*, *Lankester*, and others made several applications to the mayor, to the town clerk, who had since gone out of office, and afterwards to *Arnold*, the succeeding town clerk (appointed *January* 1st), for an inspection

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inspection of the voting papers, but that they met with various delays: That, on the 4th of *January*, *Scott* went to *Arnold*'s office at an hour appointed, and, having tendered a shilling according to the act, 5 & 6 *W.* 4. *c.* 76. *s.* 35., demanded liberty to inspect and take minutes from the papers: That *Scott* was peremptorily denied taking any minutes, and was also denied taking the whole of the voting papers into his hands, or the whole of the papers belonging to either of the wards of the said borough, or more than one paper at a time, which paper was to be returned before he was allowed to inspect any other. That, after having inspected in this manner all the papers which were thus handed out to him, and which were said to be the whole of the papers belonging to the south east ward, *Scott* again demanded to be allowed to ascertain the number of voting papers, which was refused, but that *Arnold*'s clerk at length consented to count them himself in the presence of *Scott*, when they were stated to amount in number to 165 in the south-east ward. That *Scott* and *Lankester* afterwards, *January* 14th, again demanded at *Arnold*'s office to have a full inspection, together, of the papers, tendering a shilling, and stating their object to be to ascertain the number of votes given for each candidate; but the answer given was, that the town clerk had made a rule not to allow the papers to be inspected by more than one person at a time: That *Lankester* stated, as a reason for being particular in the examination, that the mayor had not declared the numbers of votes at the election: That, the same answer being repeated, *Lankester* remained and received the first voting paper from *Arnold*'s clerk, but, upon his beginning to put marks in a paper of his own for the

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purpose of ascertaining how the burgesses had voted, *Arnold*'s clerk took the voting paper from him, saying that he was taking minutes, which could not be allowed. The deponents *Scott* and *Lankester* now stated that it would be impossible to form a satisfactory conclusion as to the votes unless they might see and minute from every voting paper; and they added their belief that, on so doing, they should be able to shew that the mayor's declaration as to the persons elected was unwarranted by the papers.

Sir *John Campbell*, Attorney-General, in moving, contended that the rule ought to be absolute in the first instance, and cited an anonymous case (*a*) from 2 *Chitty*'s *Reports*. But the Court (*b*) said that no reason appeared why the usual course should not be followed, and an opportunity given to answer the application; and the rule was granted as above.

By the affidavits of *Arnold* and others in answer, it appeared that, on the 4th of *January*, when the papers were delivered to *Arnold*, as the new town clerk, *Scott* and *Lankester* inspected them for several hours: that, from the frequent applications made by burgesses to inspect the papers, and the length of time during which they remained in his office for the purpose, *Arnold* was obliged to appoint a limited period of the day (from 11 to 3) for such inspection, but that he had afforded every facility within that time, and had suffered *Lankester* and *Scott* to exceed it: that they had required him to give extracts or copies of some of the voting papers, which he had declined to do, being advised that

(*a*) 2 *Chitt. Rep.* 290.

(*b*) Lord *Denman* C. J., *Littledale* and *Williams* Js.

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the statute did not require it. *Arnold* admitted in his affidavit that he had not allowed any burgess inspecting the papers to take more than one into his hands at the same time, but said that he made this rule upon due consideration, in consequence of the great excitement on the subject of the elections, and as a necessary precaution for the security of the voting papers, lest any should be abstracted or otherwise improperly dealt with, or any spurious or new paper should be added; and that with the like view he refused to allow an inspection by more than one burgess at the same time, as he conceived that his allowing all the papers to be placed in the hands of any one burgess at the same time, or allowing more than one burgess to inspect them at a time, would create confusion, and probably much endanger the safety of the papers; but he at all times allowed every burgess who required it the fullest opportunity of inspecting every one of the papers. He further stated that he was willing to obey any direction which the Court might lay down for his guidance; that he suffered great inconvenience from the necessity of devoting his time and that of his clerks to the exhibiting of the papers for several hours each day; that applications had been made by several burgesses at a time, who kept possession of his office while the papers were under inspection by others; and that such applications were frequently made in an irritating manner, and so as to create annoyance and interruption of his business. Conduct of this description was ascribed to *Scott* and *Lankester*. It appeared that there had been a strong party feeling in *Poole* as to the election; and that, when the voting papers were delivered to the late town clerk on the 28th of *December*, the mayor

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mayor and other magistrates, in consequence of the number of persons collected, and of a riot which had previously occurred, and on application made to them, had placed special constables at the town clerk's office for the protection of the papers.

Sir *F. Pollock*, Sir *W. W. Follett*, *Erle*, *Barstow*, and *Butt* now shewed cause. The town clerk has merely taken those precautions which were requisite for keeping the papers safe, which he was bound to use, being answerable for their secure custody, and which, in effect, best promoted the general convenience of the burgesses themselves. He had to use a discretion; and the Court will say whether he has exercised it reasonably or not. If he cannot limit the number of persons who shall inspect the papers together, he may be compellable to allow 500 at once to do so. No town clerk could keep a sufficient number of persons in attendance to conduct the business, under such circumstances. The act 5 & 6 *W.* 4. *c.* 76. *s.* 35. merely directs that, when councillors are elected, "the mayor shall cause the voting papers to be kept in the office of the town clerk during six calendar months at the least after every such election; and the town clerk shall permit any burgess to inspect the voting papers of any year, on payment of 1*s.* for every search." That clause gives no rule as to the number who shall inspect at a time, or the manner in which the papers shall be put into their hands; nor does it require the town clerk to give extracts or copies, or even allow them to be taken. That is in his discretion. Where the legislature has meant that copies of documents shall be given under this act, it is expressly so directed; as in sections 5, 15,

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17, 92. And so, in several statutes, where an absolute privilege of taking extracts has been contemplated, it is given by specific enactments, as in the Turnpike Act, 3 *G.* 4. *c.* 126. *s.* 73.; Vestry Act, 1 & 2 *W.* 4. *c.* 60. *s.* 31.; Highway Act, 5 & 6 *W.* 4. *c.* 50. *s.* 40.

Sir *J. Campbell*, Attorney-General, and *Crowder*, contrà. First, on ordinary principles, the burgesses have a right to inspect and take copies of the voting papers, unless something in the act prevents it. They are parties interested. The papers are like corporation books. Secondly, the statute expressly gives the power of inspection; that is conferred in order that the burgesses may see whether or not the mayor has made a true return; and it is necessarily incident to a power of inspection, given for such a purpose, that persons exercising it should be allowed to take memorandums. The inspection must be a useful inspection, such as will enable the burgesses, if necessary, to apply for a quo warranto. They cannot carry away in memory the substance of a great number of voting papers, so as to make affidavit of the contents. The act authorises "any burgess" to inspect; and that, according to the rule of construction given in section 142, means several burgesses. [Lord *Denman* C. J. Do you say that section 35 authorises any number to inspect together?] Any number who can be supposed to go bonâ fide. If 500 offered themselves, or if any large number came and were behaving riotously, and mutilating the documents, the case might be different; here that case does not arise. It is favourable to expedition that two should go over the papers together. As to those clauses of the present act in which the giving of extracts is expressly mentioned, they

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they necessarily mention it, as they fix a remuneration for the giving of such extracts or copies. And there is a great difference between furnishing them and permitting them to be taken. No inconvenience is specified as likely to result from the taking of extracts, or, at least, of memorandums. (They were then stopped by the Court).

Lord DENMAN C. J. It does not appear that the parties making this application have proceeded with any wish but that of obtaining information to which they were entitled. Nor is the town clerk charged with any improper motives; and he professes his willingness to abide by such directions as the Court may give. It is difficult to lay down any precise rule as to the law upon such subjects; and, whatever rule might be laid down, it is evidently necessary that, in transactions of this kind, there should be some spirit of mutual accommodation on both sides, even in the heat of political controversy. We do not, therefore, profess to enter into a strict inquiry what the town clerk may be bound to permit, or what he might be justified in refusing; but we will state what, at this moment, appears to us to be his proper course. We think the town clerk is not compellable to allow two persons at once to inspect the voting papers, or to give two of them to one person at the same time. For his duty, in these respects, we must look to the act of parliament. But we think that he is bound to allow any voter, who brings a list of his own, to compare it with the papers produced by the town clerk, and mark it according to what he finds there. The means of obtaining reasonable information will thus be secured; and, instead of particularly inquiring

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Per curiam (*a*). No sufficient objection has been made to *Wilkinson* as a relator; and, as to *Sparrowe*, we find no authority for saying that a person, who cannot himself be a relator, may not make affidavit in support of an application for a quo warranto.

The rule was made absolute.

(*a*) Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge*, Js.

Saturday, January 30th.

CRAVEN *against* SANDERSON and Others.

In prohibition by a party libelled in the Ecclesiastical Court for non-payment of a church rate, the plaintiff in his declaration alleged that the parish of *W.*, of which he was a parishioner, was immemorially divided into four townships, the inhabitants of which had been immemorially liable to repair the parish church; that the rate was made for repairing the church, but was assessed upon three of the townships only, omitting *H.*, the fourth; and that defendants had libelled plaintiff, pretending that *H.* was not liable to such repair, by reason of some supposed law or custom, and had immemorially repaired a chapel of its own. Plea, that there was, and had been immemorially, a chapel in *H.*, where the inhabitants received all divine rites and services, and which they repaired and maintained exclusively by a rate on *H.*, and that from time immemorial no rate had been assessed on any person in *H.* for the repair of the parish church; without this, that the inhabitants of the four townships were liable to contribute to the repair of the parish church; conclusion to the country, and issue joined thereon.

At the trial, the plaintiff proved that *H.* was a part of the parish of *W.*; and it appeared, on cross-examination by the defendants, that *H.* had its own church or chapel, and churchwardens, and had not, at least for twenty-five years, paid church rates to the parish. The Judge held that the defendants were entitled to a verdict on this evidence, for that, issue being joined on the traverse, the matter of inducement in the plea was admitted, and the issue confined strictly to the matter of the traverse:

Held, that the plaintiff, joining issue on this traverse, could not be taken to have admitted the previous allegations; that the traverse, if too general, was not immaterial; that the parties must be taken to have intended to put in issue the liability; and that the defendants, on whom the onus of proof lay, were to prove the matters in the inducement making up the fact traversed. Held, also, that the mere fact, of a district in a parish having kept up a chapel of its own without coming on the parish rates, did not shew a custom in such district to maintain its chapel by rates levied on its own inhabitants; and that the traverse was therefore not proved. And the Court granted a new trial.

PROHIBITION. The declaration stated that, whereas the parish of *Wakefield*, in the county and diocese of *York*, now is, and from time whereof &c. hath been, an ancient parish with a parish church belonging to the same; and, during all that time, hath been and is divided into certain townships, viz. *Wake-*

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field, Stanley-cum-Wrenthorpe, Alverthorpe-cum-Thornes, and *Horbury;* and the inhabitants of the said townships have been, during all that time, and still are, liable to contribute to the repairs of the parish church (*a*): and whereas, in the vestry of the said parish church, on the 11th of *August* 1831, the churchwardens and the inhabitants of the said parish, or the major part of them, made a rate upon the parishioners, inhabitants of the said parish, for certain repairs of the said parish church, by which rate the parishioners, inhabitants of the township of *Horbury*, were not rated to the repairs of the said church; and the parishioners inhabitants of the said townships of *Wakefield, Stanley-cum-Wrenthorpe*, and *Alverthorpe-cum-Thornes*, only, by the said rate, were rated to the said repairs, excluding *Horbury* and the parishioners, inhabitants thereof, from contribution of the said rate to the said repairs: and the said plaintiff before and at the time of the making of the said rate, and thence hitherto, has been and still is a parishioner, inhabitant in the township of *Wakefield* aforesaid; yet the said defendants, churchwardens of the said parish, well knowing &c., but pretending that the parishioners, inhabitants of the said township of *Horbury*, are not liable to contribute or be rated to the repairs of the said parish church by reason of some supposed custom, prescription, or law of the land, and that the repairs of a certain chapel in *Horbury* aforesaid have been immemorially made by the parishioners, inhabitants of the said township of *Horbury*, only, and that the said rate, in respect of the said premises, was and is a valid rate, and intending to aggrieve, &c.: the declaration then set

(*a*) Some allegations in the pleadings, as to certain district chapels, are omitted as not material here.

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out the libel of the defendants in the spiritual Court, which alleged that the parish church of *Wakefield* wanted repairs, &c., the costs of which ought to be paid by a rate on the possessors and occupiers of houses, lands, &c., in the townships of *Wakefield*, *Stanley-cum-Wrenthorpe*, and *Alverthorpe-cum-Thornes*; that the said *Michael Sanderson* &c. (the defendants in this action), after the requisite proceedings (which were set out), made, with the inhabitants, a rate for the repair, &c., of the said church; and that *Craven* (the plaintiff in this action) was thereby duly rated at the sum of &c. for premises which he occupied in the parish of *Wakefield*; that *Sanderson*, &c., were the churchwardens of the said parish duly elected, sworn and admitted; and that the rate was then due. The plea to the libel was also set out, wherein the respondent alleged that the exemption of *Horbury*, if any, from liability to repair the parish church, ought to have been pleaded; and he denied that he was legally rated, or that the rate was due to the churchwardens as libelled. A further plea was set out, which it is not necessary to state. The declaration then set out the answer of the churchwardens, in which they insisted on the exemption of *Horbury*, and the liability of the other townships, and alleged that *Horbury* had a chapel with all parochial rites, which chapel had from time immemorial been repaired by the inhabitants of that township. The answer of *Craven* was added, in which he again denied that the three townships were liable in exclusion of *Horbury*, or that *Horbury* had exclusively repaired the last mentioned chapel.

To the declaration in prohibition the defendants pleaded, that there now is, and from time immemorial hath

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hath been, a church or chapel within the township of *Horbury* aforesaid, at which the inhabitants of that township do receive and enjoy, and from time immemorial have received and enjoyed, all manner of divine rites and services, and that the costs and expenses of repairing the said church or chapel, and of providing necessaries for the performance of divine rites and services therein, are, and from time immemorial have been, exclusively paid and defrayed by rates and assessments upon the possessors and occupiers of houses, lands, and tenements, situate within the said township of *Horbury*; and that, from time whereof &c., no rate or assessment for or towards paying or defraying the expenses of repairing the parish church of *Wakefield* aforesaid has been made, laid, or assessed upon any person for or in respect of any houses, lands, or tenements, situate within the township of *Horbury* aforesaid: Without this, that the inhabitants of the said townships of *Wakefield*, *Stanley-cum-Wrenthorpe*, *Alverthorpe-cum-Thornes*, and *Horbury*, in the said declaration mentioned, from time whereof, &c., have been or are liable to contribute to the repairs of the said parish church of the parish of *Wakefield* aforesaid, in manner and form &c. Conclusion to the country. Similiter.

On the trial before Lord *Lyndhurst*, C. B., at the *York* Summer assizes 1834, the plaintiff proved that the chapelry of *Horbury* was within the parish of *Wakefield*, and paid small tithes and mortuaries to the vicar. The parish clerk of *Wakefield*, who was called on behalf of the plaintiff, stated, on cross-examination, his belief that *Horbury* had a church to itself, and that, for twenty-five years, during which he had been clerk, no church rates for the parish had been collected in *Horbury*; he also stated

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stated that the *Horbury* people did not attend the parish vestry; that there were in the parish of *Wakefield* six churchwardens for *Wakefield* township, one for *Stanley*, and one for *Alverthorpe*, but none for *Horbury*; and that churchwardens for *Horbury* were sworn in at the visitations, apart from the *Wakefield* churchwardens. The defendants called no witness. The Lord Chief Baron was of opinion that the issue was confined strictly to the matter contained under the traverse, that the inducement must be taken as admitted, and that the defendants' case on the issue was proved by the evidence for the plaintiff. He directed the jury accordingly; and the defendants had a verdict. In the ensuing term *Alexander* moved for a rule to shew cause why there should not be a new trial on the ground of misdirection; or why there should not be judgment non obstante veredicto. The ground for the latter part of the motion was, that the plea, if limited to the matter of the traverse, tendered no sufficient issue, as it did not then put in issue the material facts stated in the inducement, and particularly as it did not allege that all divine rites had been performed at the chapel at *Horbury*, which was necessary to discharge a district from the reparation of the mother church; 1 *Burn's Eccl. Law*, p. 353 (*a*). A rule nisi having been granted,

Sir *F. Pollock*, Sir *W. W. Follett*, and *Joseph Addison*, shewed cause in this term (*b*). The issue is a proper one, and was proved on behalf of the defendants. The declaration alleges that the townships of *Wakefield*,

(*a*) 8th ed. tit. *Church*, vi. 8.

(*b*) *January* 20th. Before Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* Js.

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Stanley, *Alverthorpe* and *Horbury* have immemorially been, and still are, liable to contribute to the repairs of the parish church. The plea, after stating some matters of inducement, traverses that allegation. A mixed proposition of law and fact is directly alleged in the declaration and is denied in the plea: and upon that denial the plaintiff takes issue. Matter of law may be put in issue, if complicated with matter of fact; *Dawes* v. *Papworth* (*a*). If the traverse had been immaterial, the plaintiff might have pleaded over to the inducement; *Reg. Gen. Hil.* 4 *W.* 4, *General Rules and Regulations*, 18 (*b*). But this was a material traverse; and, even if it be otherwise, the objection could be taken only by special demurrer; *Com. Dig. Pleader*, (G. 22.) 1 *Wms. Saund.* 14, note (2). Then the evidence, with the matter of inducement to the plea, which was admitted, entitles the defendants to retain their verdict (*c*).

Alexander and *Hoggins*, contrà. It lay on the defendants to take themselves out of the general rule of liability to repairs. The plaintiffs could not have passed by the traverse and pleaded to matter in the inducement, because the traverse was not wholly immaterial. It contained a mixed proposition of law and fact, the result of the several allegations in the former part of the plea, all of which led to one point. The whole substance of those allegations was put in issue by the replication, as in the instances, discussed in *Selby* v. *Bardons* (*d*), where a plea involving several facts has

(*a*) *Willes*, 408. (*b*) 5 *B.* & *Ad.* vi.

(*c*) Other points were discussed, but not decided upon by the Court.

(*d*) 3 *B.* & *Ad.* 2. *S. C.* in Error, *Bardons* v. *Selby*, 1 *Cro.* & *M.* 500. 3 *Tyr.* 490.

been

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been held good as establishing only a single point of defence. Then the evidence fell short; for the defendants ought to have shewn that the inhabitants of *Horbury* enjoyed the benefit of all ecclesiastical rites in their chapel, and that it was maintained by rates laid on that township. [*Coleridge* J. You say that all the matters in the inducement are put in issue: can that be so, if there is a formal issue on a traverse which is not immaterial? If the traverse was merely a conclusion from the facts previously set out in the plea, should not you have traversed some part of those facts? *Littledale* J. In *Selby* v. *Bardons* (*a*) all the introductory matters of the plea were put in issue by the manner in which they were pleaded. Here, the mode of pleading is different. In pleas where a traverse is led to by an inducement, facts stated in the introductory part may be very fit to be proved, with reference to the matter traversed; but they do not require to be proved as forming part of the inducement. Here, if the plaintiff wished to raise an issue on the matters which are stated in the inducement, he might have brought them into question by averring in his declaration the facts on which the supposed liability is grounded, instead of merely stating the liability. As the pleadings stand at present, I doubt if the issue on the traverse is not one of law, except that it is mixed up with the proceedings in the ecclesiastical court.]

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. The plaintiff in prohibition complained of

(*a*) 3 *B.* & *Ad.* 2. *S. C.* in Error, *Bardons* v. *Selby*, 1 *Cro.* & *M.* 500. 3 *Tyr.* 490.

a church

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CRAVEN *against* SANDERSON.

a church rate laid on three only out of four townships, which compose the parish of *Wakefield*. The defendant claimed exemption for the fourth township (*Horbury*), in a plea alleging that it had a separate chapel of its own, and a custom to perform there all ecclesiastical rites, and to repair it by rates levied exclusively on its own inhabitants, and traversing the liability of all four to repair the parish church. Issue was joined on the traverse. On the trial at *York* before Lord *Lyndhurst*, the plaintiff contented himself with proving that the township of *Horbury* was locally situate in the parish of *Wakefield*. The defendant then argued, from evidence adduced by the plaintiff, that *Horbury* had a separate chapel where the rites were administered; and the learned Judge interposed with an observation to the plaintiff's counsel that the evidence appeared very strong to that effect. The plaintiff's counsel required proof of separate rates being laid; but the Judge then said that issue was joined on the liability traversed, and that all the inducement to that traverse was admitted by the plaintiff's taking issue on it.

The jury hereupon found a verdict for the defendants, which we are now required to set aside and grant a new trial, or give judgment for the plaintiff, non obstante veredicto. But we think it would be inexpedient to decide, in this motion, the questions of law that may be raised on the validity of the plea, because the course taken at the trial in regard to the evidence appears to us to have been incorrect. For the traverse of liability, if wrong as too general, cannot be called immaterial, since it was the very point on which the cause turned: and we do not see how the plaintiff, denying the traversed fact, can be supposed to have admitted all the particulars

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particulars in the inducement which are put forward as making up that general fact. If, on the other hand, the traverse was immaterial within the meaning of the 13th rule of *Hilary* term, 4 *W.* 4. (*a*), so as to authorize the plaintiff to pass over it, and select a single fact for denial, he ought to have taken that course. As the pleadings stand, both parties are content to meet on the question of liability; and the defendant, on whom the burden of proving the exemption of *Horbury* falls, because it is against common right, was bound to make out all that was necessary to that end. The least he could do to entitle himself to a verdict was to prove all the facts stated in his inducement. Now it is clear on consideration, though it struck my mind otherwise during the argument, that the mere fact of the chapel being kept in repair without coming upon the general rates of the parish is no proof of the custom to repair it by means of *a rate* levied in the township, because it may have been preserved and repaired by voluntary contribution of the parishioners or others. It follows that the defendant, who has obtained a verdict in favour of the exemption from church rates, without proving that part of his plea which avers the liability to chapel rates, cannot be allowed to keep that verdict; and the plaintiff is entitled to a new trial.

Rule absolute for a new trial.

(*a*) 5 *B.* & *Ad.* vi.

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NICHOLSON *against* JOHN REVILL the younger.

Saturday, January 30th.

ASSUMPSIT. First count on a note made by defendant, *January* 1st 1832, promising to pay plaintiff or his order, 25 months after date, 110*l.* 13*s.* 4*d.* Second count on a note of the same date made by defendant, promising to pay plaintiff or his order, 31 months after date, 56*l.* 13*s.* 8*d.*

Pleas. To the first count, that the note therein mentioned was a note made by defendant, *Samuel Revill*, and *John Revill*, defendant's father, and by them delivered to plaintiff, whereby they jointly and severally promised to pay &c.: and that, after the making and delivery thereof, and before the commencement of this suit, to wit, &c., plaintiff, without defendant's knowledge or consent, struck out and erased the name of *Samuel Revill* on the note, and wholly discharged him from all liability thereon, and from payment of the sum therein mentioned or any part thereof: verification. To the second count, the like plea, and verification.

Replication to the first plea. That, before and at the times after-mentioned, *J. R.* the father was indebted to plaintiff in 299*l.* on an account stated, whereof defendant at the said times had notice; and thereupon, viz. and 56*l.* 13*s.* 8*d.* at longer periods, as a satisfaction and security for 200*l.* parcel of the debt due from *J. R.*, with interest; and the notes were so given. It was further pleaded that, the first note being due and unpaid, and the second (now sued upon) not yet due, *S. R.* agreed with the plaintiff to pay, and did pay him, 100*l.* in discharge of *S. R.*'s liability on the three last-mentioned notes, and plaintiff accepted the same in such discharge, and gave up to *S. R.* the first of the three notes, indorsed upon the note now sued upon a receipt of 47*l.* 1*s.* 4*d.* on account, erased *S. R.*'s name from this note, and discharged him from further liability thereon. These facts being admitted, and it being answered that the last mentioned transaction with *S. R.* took place without defendant's knowledge or consent, which was not denied:

Held, that the discharge of *S. R.* by the plaintiff discharged the defendant.

In assumpsit on a promissory note, it was pleaded that, *R.* owing plaintiff 299*l.*, plaintiff agreed with *R.*, *S. R.*, and defendant, that they should give plaintiff, and he should accept, their joint and several note for 299*l.* as a satisfaction and security for the debt, which was done. It was further pleaded that, the note being due, and the debt unpaid, and plaintiff having sued the three makers, it was agreed that the action should cease, and that the three makers should give their three joint and several notes for 52*l.* 18*s.* 8*d.* at thirteen months, and 110*l.* 13*s.* 4*d.*

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NICHOLSON *against* REVILL.

March 8th, 1826, in consideration of the premises, it was agreed by and between plaintiff, *J. R.* the father, *Samuel Revill* and defendant, that plaintiff should accept, and the three other parties should give, their promissory note bearing date the day last-mentioned, whereby they jointly and severally promised to pay plaintiff or order on demand 299*l.* with interest, as and for a satisfaction and security of and for the said debt so due from *J. R.* the father to plaintiff: That the note was so given and accepted, in pursuance of the agreement, as and for a satisfaction and security &c.: That afterwards, the note being payable and unpaid, and the debt still due, and an action on the note pending at the plaintiff's suit against *J. R.* the father, *S. R.* and defendant, viz. *July* 21st, 1832, in consideration of the premises, it was agreed, by and between plaintiff and *J. R.* the father, *S. R.* and defendant, that the action should cease, and that plaintiff should accept, and *J. R.* the father, *S. R.* and defendant should give their three promissory notes, viz., one promissory note of *January* 1st, 1832., whereby they jointly or severally promised, 13 months after date, to pay plaintiff or order 52*l.* 18*s.* 8*d.*, the promissory note mentioned in the first count and first plea, and the promissory note mentioned in the second count and second plea, respectively, as and for a satisfaction and security of and for 200*l.*, parcel of the said debt due from *J. R.* the father to plaintiff, with interest from *January* 1st, 1832: That the said three notes were, on *July* 21st, 1832, made and given in pursuance of the agreement as and for a satisfaction and security, &c., and accepted by plaintiff accordingly: That afterwards, and when the time for payment of the first of the said three notes had long elapsed, the money due thereon

not

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not having been paid, and before the day of payment of the note mentioned in the first count and first plea, viz. on *January* 28th, 1834, the said *Samuel Revill* proposed to plaintiff to pay him 100*l.* in discharge of his liability on the three last-mentioned notes, which plaintiff agreed to accept, and thereupon, viz. on the day last aforesaid, the said *S. R.* paid plaintiff 100*l.* in discharge &c., and plaintiff accepted the same accordingly; and thereupon plaintiff gave up to *S. R.* the first of the three last-mentioned notes, and indorsed on the note mentioned in the first count and first plea as follows, viz. "Received on account by *Samuel Revill* 47*l.* 1*s.* 4*d.*; this sum, with the amount of the first note, make 100*l.*:" And that, after such payment by *S. R.*, plaintiff struck out the name of *S. R.* on the note in the first count and first plea mentioned, and erased the same therefrom, and discharged *S. R.* from any further liability on the last-mentioned note, and from any further payment on account thereof, which said striking out &c. and discharging &c. are the same supposed striking out &c. as in the first plea mentioned. Verification. The replication to the second plea was the same, mutatis mutandis; only not stating any indorsement to have been made by plaintiff on the note.

Rejoinder to the replication to the first plea; that the three promissory notes in that replication mentioned were given for securing payment of sums together exceeding 200*l.*, viz. 220*l.* 5*s.* 8*d.*, and were so given by *J. R.* the father, and by *S. R.* and the defendant as his sureties, and have been held by plaintiff for securing part of the said debt of *J. R.* the father and interest thereon as in the replication to the first plea mentioned, and for no other consideration or

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purpose: and that the proposal of *S. R.* in that replication mentioned was so made by him, and accepted and acted on by plaintiff, and the name of *S. R.* struck out from the note in the first count mentioned, and *S. R.* discharged from liability thereon, without the knowledge, privity, or consent of defendant. Verification. The rejoinder to the replication to the second plea was the same, mutatis mutandis.

Surrejoinder. To the first rejoinder: that, at the time of giving the three promissory notes, therein and in the replication to the first plea mentioned, the money satisfied and secured to plaintiff by the said note of *J. R.* the father, *S. R.* and defendant, in the said replication first mentioned, remained long overdue, and the debt due from *J. R.* the father to plaintiff as in the said replication mentioned remained wholly unsatisfied, and the action in that replication mentioned was pending, and the agreement therein secondly mentioned had been entered into: and that the existence of the said several circumstances, so in the said replication, and now again in this surrejoinder, above mentioned, were the consideration and purpose of the said three promissory notes in the said replication and rejoinder above-mentioned being given. Without this, that the said three notes were given by *S. R.* and the defendant as sureties of or for *J. R.* the father, and for no other consideration or purpose whatsoever, in manner and form &c. Conclusion to the country. The surrejoinder to the second rejoinder was the same, mutatis mutandis.

Demurrer to each surrejoinder, assigning for cause, that the plaintiff has offered to put in issue a matter not properly issuable; has not denied, or confessed and avoided, the substantial matter in the rejoinder; and has

has traversed a negative, and a matter not alleged in the rejoinder. Joinder in demurrer.

The demurrers were argued in this term (*a*).

Wightman in support of the demurrers. Where a note, to which several persons are parties, is altered in a material point without the consent of one party, he is discharged: *Perring* v. *Hone* (*b*) shews the extent to which this doctrine is carried. In the present case there is a material alteration in each of the notes. If the defendant, who is severally liable, be compelled to pay either of the notes, he has now no remedy against *Samuel Revill* for contribution, *Samuel*'s name being struck out. The plaintiff has put it out of his own power to sue *Samuel Revill*, by the composition entered into between them, and the erasure of *Samuel*'s name. The principle of contribution is, that the party seeking it has been obliged to pay money for which the party of whom he demands it was liable. But *Samuel* is no longer liable. If the present plaintiff recovers, and the defendant brings an action against *Samuel* for money paid to his use, he may deny that it was so paid, he having been released and his name erased from the note. [Lord *Denman* C. J. The joint liability of *Samuel* and the defendant arises from their joint act in making the note. I do not see how it is affected, as between themselves, by *Samuel*'s name being struck out.] In *Co. Litt.* 232 *a.* it is said, "when divers do a trespass, the same is joint or several at the will of him to whom the wrong is done, yet if

(*a*) *January* 15th. Before Lord *Denman* C. J., *Littledale* and *Williams* Js.

(*b*) 4 *Bing.* 28.

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he release to one of them, all are discharged." And "If two men be jointly and severally bounden in an obligation, if the obligee release to one of them, both are discharged;" which last point is also agreed to in *Clayton* v. *Kynaston* (*a*).

G. T. White, contrà. *Perring* v. *Hone* (*b*) is distinguishable, because there the alteration consisted in making a party liable severally who was not so before; here the note was several at first, or otherwise, at the election of the holder. The right to contribution is not affected as between the defendant and *Samuel Revill*. A release of the principal discharges the sureties; but a compromise between the creditor and one of the sureties does not discharge a co-surety; for he, if obliged to pay more than his proportion, may still have recourse for contribution to the surety who made the compromise; *Ex parte Gifford* (*c*). The defendant here, if obliged to pay the amount of the notes, may take his remedy in equity against *Samuel Revill*, notwithstanding the erasure. Besides, the transaction in this case is not equivalent to a release. The plaintiff merely says, in effect, to *Samuel Revill*, that he will not, from thenceforward, sue him upon that note. Where there are two obligors, and the obligee covenants with one of them not to sue him on the bond, he may nevertheless sue the other, *Dean* v. *Newhall* (*d*), for such covenant does not operate as a release. But, further, by the second agreement stated in the replication, *Samuel Revill* and the defendant became principals. A suit was depending against them, in which they were

(*a*) 2 *Salk.* 574.
(*b*) 4 *Bing.* 28.
(*c*) 6 *Ves.* jun. 805.
(*d*) 8 *T. R.* 168.

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answerable for 299*l.*; in consequence of that they gave the notes in question, and thereby purchased a benefit to themselves in the suspension of the suit. Afterwards, *Samuel Revill* paid 100*l.* which was more than a third of the amount for which the three had engaged themselves by the new notes. In *Collins* v. *Prosser* (*a*), where the bond was several, it was held that tearing off the seal of one obligor did not discharge the others; and *Bayley* and *Best* Js., in putting the case of a joint and several bond, went no farther than to say that an act which discharged one of the obligors on such a bond *might* discharge all. And, however this may be, removing the seal of a bond is very different from the mere erasure of a name on a note.

Wightman, in reply. It appears by the pleadings that the plaintiff accepted 100*l.* partly in consideration of notes not yet due. For that benefit to himself he discharged *Samuel Revill*. The transaction took place without the consent of the other parties to the notes. *Samuel* had no right to procure a release to himself, throwing upon the defendant, without his sanction, the onus of the notes remaining due; which would be the effect of the proceeding, if the defendant were held to continue liable. In *Cheetham* v. *Ward* (*b*) the executors of *Abraham Cheetham* sued *James Ward* on a joint and several bond, given by the defendant and *William Ward* one of the plaintiffs; and it was pleaded that, after the making of the bond, *Abraham Cheetham* made *William Ward* his executor, and he proved and took upon himself execution, whereby the debt was

(*a*) 1 *B.* & *C.* 682. (*b*) 1 *B.* & *P.* 630.

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extinguished. The Court of Common Pleas, on the authority of a case in the Year-books (*a*), held that the discharge of one joint and several obligor, by making him executor, discharged both. In the case there referred to, it was said that a recovery against one obligor, and execution sued, would be a discharge to the others. And so of a discharge made to one of them. In the present case it is expressly stated by the replication that, after the payment of 100*l.*, the plaintiff discharged *Samuel Revill* from any further liability on the note remaining due.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. After having stated the declaration and the defence pleaded, his Lordship said: We need not enquire what the effect of a demurrer to this plea would have been, because additional facts are brought to our knowledge by the subsequent pleadings. The replication to the first plea states, (His Lordship then stated the replication and subsequent pleadings down to the surrejoinders).

To these surrejoinders the defendant demurs, and has contended that the traverse is immaterial, and that the facts appearing on the record entitle him to our judgment; and we are of that opinion. But we do not proceed on some of the grounds mentioned at the bar, such as the effect of the plaintiff's alteration of the instrument as making it void, or that the defendant thereby lost his right to contribution from the joint makers of the note; nor on any doctrine as to the relation of principal and surety. We give our judgment merely on the

(*a*) *Year-book, Mich.* 21 *Edw.* 4, 81 *B.* pl. 33.

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principle laid down by Lord Chief Justice *Eyre* in *Cheetham* v. *Ward* (*a*), as sanctioned by unquestionable authority, that the debtee's discharge of one joint and several debtor is a discharge of all. For we think it clear that the new agreement made by the plaintiff with *Samuel Revill*, to receive from him 100*l.* in full payment of one of the three notes and in part payment of the other two, before they became due, accompanied with the erasure of his name from those two notes, and followed by the actual receipt of the 100*l.*, was in law a discharge of *Samuel Revill*.

This view cannot perhaps be made entirely consistent with all that is said by Lord *Eldon* in the case *Ex parte Gifford* (*b*), where his Lordship dismissed a petition to expunge the proof of a surety against the estate of a co-surety. But the principle to which we have adverted was not presented to his mind in its simple form; and the point certainly did not undergo much consideration. For some of the expressions employed would seem to lay it down that a joint debtee might release one of his debtors, and yet, by using some language of reservation in the agreement between himself and such debtor, keep his remedy entire against the others, even without consulting them. If Lord *Eldon* used any language which could be so interpreted, we must conclude that he either did not guard himself so cautiously as he intended, or that he did not lend that degree of attention to the legal doctrine connected with the case before him, which he was accustomed to afford. We do not find that any other authority clashes with our present judgment, which must be in favour of the defendant.

Judgment for the defendant.

(*a*) 1 *B. & P.* 630. (*b*) 6 *Ves.* jun. 808.

Saturday, January 30th.

MORELL *against* HARVEY.

In pleading a surveyor's assessment, made on occupiers of lands, under stat. 13 *G.* 3. *c.* 78. sects. 30. and 45., it is necessary to aver that the assessment did not exceed 9*d.* in the pound *on the yearly value of the lands;* although the limitation as to value annexed to sects. 30. and 45. is contained in a distinct proviso; and although the form of an order of justices in Sched. No. 15. of the act, adapted to the above sections, makes no mention of yearly value.

REPLEVIN. Cognizance as constable of the hundred of *East Barnfield, Kent*, acting under a warrant of distress. The cognizance alleged that at the days and times, &c., plaintiff was the occupier of certain lands within the parish of *Hawkhurst, Kent*, of large yearly value, viz., &c., and, being such occupier, was liable to be assessed towards the repairing of the highways, buying materials, &c., and paying the surveyor's salary, within the said parish, according to the statute, &c., in respect of his said occupation, &c. It then went on to state an application by the surveyors of *Hawkhurst*, at a special session, for an order for making an assessment of 9*d.* in the pound on the occupiers of lands, &c., in *Hawkhurst;* that the justices, in special session, being satisfied by proof, &c., that the duty directed to be performed, and the money authorised to be collected and received, by stat. 13 *G.* 3. *c.* 78., had been performed, applied, and expended, according to the act, &c., and that notice had been given, &c., made an order that "an equal assessment, not exceeding the sum of 9*d.* in the pound, upon all and every the occupiers of lands," &c., within the parish of *Hawkhurst*, should be forthwith made, allowed, and collected, and the money applied in repairing the roads, buying materials, &c.: That the surveyors, by virtue of the order, made "an equal assessment, not exceeding the sum of 9*d.* in the pound, upon all and every the occupiers of lands," &c., within *H.*, which was afterwards duly allowed.

lowed. And the cognizance further stated, "that, in and by such assessment so made as aforesaid, the said plaintiff was assessed for and in respect of the said lands, tenements, woods, tithes, and hereditaments, then in the occupation of him the said plaintiff, within the said parish of *Hawkhurst*, in a certain sum, viz. the sum of 45*l.* 18*s.* 4*d.*, being at and after the rate of 9*d.* in the pound, by such equal assessment so made as aforesaid: of all which said several premises" &c. (notice to plaintiff). Then followed allegations of the demand and refusal of the rate, proceedings thereon, and the issuing of the distress warrant, under which defendant acted. Demurrer, assigning several causes. (The only cause upon which the Court decided will sufficiently appear from the argument.) Joinder. The demurrer was argued in this term (*January* 26th) (*a*).

Wightman, in support of the demurrer. By sect. 30. of the general highway act, 13 *G.* 3. *c.* 78. (*b*), justices are empowered, on application by the surveyor under the circumstances there mentioned, to order an equal assessment on all occupiers of lands within the parish, for buying materials to repair the highways, and for some other purposes, such assessment to be levied as after-mentioned: provided that no such assessment shall exceed 6*d.* in the pound *of the yearly value* of such lands. Section 45 enacts that if, on application, and proof given as there mentioned, the justices shall be satisfied that the highways cannot be sufficiently repaired by the means before prescribed, then an equal assessment upon all and every the occupiers of lands, &c.,

(*a*) Before Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* Js.

(*b*) Repealed by stat. 5 & 6 *W.* 4. *c.* 50.

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within the parish, shall be made, collected, and allowed as the justices shall direct, and the money thereby raised shall be employed and accounted for, according to their orders, in repairing the highways, &c. But, by section 46, this assessment, and the assessment before mentioned, are not together, in any one year, to exceed 9*d.* in the pound *upon the yearly value* of the lands and tenements to be assessed (*a*). The cognizance states only that an equal assessment, not exceeding 9*d.* in the pound, was ordered to be made upon the occupiers of lands, not adding any reference to the yearly value; and that the plaintiff was assessed in and by such assessment for his lands in *Hawkhurst*, in the sum of 45*l.* 18*s.* 4*d.*, being at the rate of 9*d.* in the pound, not stating upon what value. The authority to impose a tax must be strictly pursued, and should be shewn, in pleading, to have been so. [*Littledale* J. The order at special sessions for an assessment of 6*d.* in the pound, given in the schedule, No. 15, says nothing of yearly value: but that is merely the order to the surveyor to make an assessment; the direction how he shall make it is given in the statute itself. Then, as the limitation with reference to yearly value is contained in a distinct proviso, there may be a question whether it forms such an exception as to come within the rule observed upon by *Lawrence* J. in *Gill* v. *Scrivens* (*b*), and, if so, whether it required to be noticed

(*a*) 13 *G.* 3. *c.* 78. *s.* 46. "Provided nevertheless, that the assessment herein last before authorised, and the assessment hereinbefore authorised, for buying materials, making satisfaction for damages, erecting guide posts, and paying the surveyor's salary, shall not together, in any one year, exceed the rate of 9*d.* in the pound of the yearly value of the lands, tenements, woods, tithes, and hereditaments, so to be assessed."

(*b*) 7 *T. R.* 31.

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by the party relying on the principal clause.] It cannot appear without reference to the proviso that the surveyor has performed his duty, because the proviso furnishes the rate at which the assessment is to be imposed, and the data on which it is to be calculated.

Channell, contrà. The question is, not whether the assessment must be actually calculated on the yearly value, but whether that must appear by the assessment, as set out in the pleading. To ascertain this, sect. 45. must be referred to. [*Coleridge* J. The assessment is made under sect. 30. as well. Sect. 45. does not authorise a rate for buying materials.] The validity of the assessment, as pleaded, must be determined, at all events, by reference to the two sections, and to the schedule, No. 15., which is framed upon the latter section, but applies to both. By sect. 45. the assessment is to be made and collected by such person and persons, and allowed in such manner, as the justices, by their order, shall direct. That order is the source of the surveyor's authority; its form is prescribed by the schedule, No. 15., and ought not to be departed from; and nothing is there said, but that "an equal assessment, not exceeding the sum of—in the pound," on all and every the occupiers, &c., shall be forthwith made. Besides, the proviso in sect. 46. is not an exception incorporated in the enacting clause which it qualifies; and therefore the defendant in this case was not bound to refer to it in his pleading.

Wightman in reply. The scheduled forms of this act were not meant to be so binding that the obvious construction of the enacting clauses should be overlooked. By sect. 69. they may be varied or added to according

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to circumstances. Consistently with the order, as stated in this cognizance, the occupiers might have been assessed in respect of their personal ability; and the assessment, as pleaded, may have been on the gross value of the lands.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court as follows:—The defendant justifies as bailiff of the hundred of *East Barnfield* in *Kent*, under a warrant of distress directed to him by two justices of the peace for levying a highway assessment. The cognisance avers that the two surveyors made application at a special sessions for an assessment of 9*d.* in the pound on all and every the occupiers, and that the justices of the peace ordered such assessment upon all the occupiers of lands, tenements, woods, tithes, and hereditaments to be forthwith made, and then proceeds to justify the taking, under a warrant of distress issued for nonpayment of it. This cognizance was demurred to for numerous causes, one of which we think good. The passage of the cognizance above selected makes the objection apparent; and we need give no opinion on any of the other points raised.

The act requires, by way of proviso, that the rate shall not exceed 9*d.* in the pound on the yearly value of the lands, &c., subject to be rated. The averment is that the assessment was made on the occupiers of lands, &c.; and that it did not exceed 9*d.* in the pound: but not (as the statute requires) that it does not exceed 9*d.* in the pound on the *yearly* value of such lands, &c. The averment, that it does not exceed 9*d.* in the pound, has of itself no meaning, but must be referred to something; and if, consistently with the ordinary use of words,

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it can be referred to "lands," &c., which are mentioned immediately before, the statement will still be defective; for the meaning must then be *the value* of the lands, &c., and not their *yearly value*.

For this defect, without considering the others alleged, our judgment must be for the plaintiff.

Judgment for the plaintiff.

The KING *against* The Justices of GLOUCESTERSHIRE.

Monday, February 1st.

AT the quarter sessions for the county of *Gloucester*, held 5th of *January* 1836, application was made to enrol and confirm an order of two justices of the county for diverting and turning a public footway in the parish of *Clifton* in the said county. There was no appeal against the order; and the necessary preliminaries under stat. 55 *G.* 3. *c.* 68. *s.* 2. (*a*) had been fulfilled. The proceedings (commencing with the precept of two justices to the high constable, giving notice of their intention to hold a special sessions for the purpose of viewing, &c., and directing the acting justices to be summoned) had all taken place subsequently to the 9th of *September* 1835, on which day stat. 5 & 6 *W.* 4. *c.* 76. passed. Before that act, the parish of *Clifton* was part of *Gloucestershire* for all purposes except that of electing members of parliament; and the justices of *Gloucestershire* had at all times exercised jurisdiction over the county. The court of

By stat. 2 & 3 *W.* 4. *c.* 64. *s.* 36. sched. (O.) 30., *Clifton* is made a part of the parliamentary borough of *Bristol*, which is a county of itself. Except so far as that act operated, it was in the county of *Gloucester*: Held that, after the passing of the Corporation Act, 5 & 6 *W.* 4. *c.* 76. *ss.* 7, 8, the *Gloucestershire* justices had no longer the power to make an order for diverting a footway in *Clifton*, their jurisdiction, in such cases, being transferred to the justices of *Bristol*.

(*a*) Repealed by stat. 5 & 6 *W.* 4. *c.* 50. (see sects. 1, 84, 85.), which came into operation on 20th *March* 1836, by sect. 119.

quarter

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quarter sessions refused the application, on the ground that, by stat. 5 & 6 *W.* 4. *c.* 76., the parish of *Clifton* was included within the county of the city of *Bristol*, and taken out of the jurisdiction of the county of *Gloucester*, from the passing of the said act.

On an affidavit of the above facts, *Greaves*, in this term, obtained a rule (*a*) calling upon the justices of the county of *Gloucester* to shew cause why a mandamus should not issue, commanding them to enter, as of the last general quarter sessions of the peace held in and for the said county, the said application, and to enter continuances thereon to the next general quarter sessions for the county, and, at such next quarter sessions, to hear and determine the said application. On a subsequent day of the term,

Sir *J. Campbell*, Attorney-General, and *Maule*, shewed cause (*b*). Stat. 5 & 6 *W.* 4. *c.* 76. *s.* 7. enacts that, after the passing of the act, "the metes and bounds of the several boroughs named in the first section of the said schedules (A.) and (B.) for the purposes of this act shall be the same as the limits thereof respectively settled and described" in the Parliamentary Boundary Act, stat. 2 & 3 *W.* 4. *c.* 64. *Bristol* is named in the first section of the schedule (A.) of stat 5 & 6 *W.* 4. *c.* 76; and, by stat. 2 & 3 *W.* 4. *c.* 64. *s.* 35. sched. (O.) 30., *Clifton* is included within the the limits of *Bristol*. Then stat. 5 & 6 *W.* 4. *c.* 76. *s.* 8. enacts "that every place and precinct which shall be included within the

(*a*) See the form of the rule in *Rex* v. *The Justices of Suffolk*, 6 *B.* & *C.* 111.

(*b*) *January* 30th. Before Lord *Denman* C. J., *Littledale* and *Williams* Js. *Coleridge* J. was sitting in the bail court for *Patteson* J., who was sitting at Nisi Prius in *London*.

metes

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metes and bounds of any borough as herein-before provided, and none other, shall be part of such borough, and in those boroughs which are counties of themselves shall be part of such county and of none other." *Bristol* is a county of itself; and, therefore, without enquiring what would be the case where the borough was not a county of itself, *Clifton* is a part of the county of *Bristol*, and of no other. The words "and of none other" appear to have been inserted for the purpose of removing doubt on such a question as this. The magistrates of *Gloucestershire* have therefore no jurisdiction over *Clifton* since the 9th of *September* 1835. The "purposes of this act," referred to in sect. 7, are all matters relating to municipal government; and no limitation can be supplied which is not expressed. By a proviso in sect. 8, if any place or precinct was previously liable to contribute to a rate for satisfying a debt to which the rate-payers of the borough were liable, the proportion, in case of a difference arising, is to be assessed by a barrister appointed by the senior judge of assize for the county of which such place or precinct is thenceforward to be taken to be part. This shews that the legislature have specifically mentioned such cases as are not to be governed by the general enactment that the place is to form part of the borough: and, again, as they give the appointment to the judge of assize for the county of which the place is thenceforward to be part, they assume that the place falls under the general jurisdiction of the borough to which it is attached. Again, the provision in sect. 8, for excepting the county gaol, &c., shews that the enactment is perfectly general, saving only cases expressly excepted. A habeas corpus was lately granted by

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Patteson J., removing a prisoner, who was charged with a felony committed in *Clifton*, from *Gloucestershire* to *Bristol*, where he was tried.

Greaves contrà. Sect. 8. speaks of places and precincts included, "as hereinbefore provided," that *is*, by reference to sect. 7, "for the purposes of this act." The question, therefore, is merely what are the purposes of the act; and these must be collected from the whole act. The enactment in question applies as well to boroughs which are not, as to those which are, counties in themselves: no interpretation of it can therefore be adopted which introduces an absurdity in either case. By the preamble, it appears that the object of the act is to alter the charters by which the bodies corporate are constituted; but questions as to the local extent of the jurisdiction of county justices are not immediately connected with the chartered constitutions of bodies corporate, as such. The clause cited from sect. 8, respecting the apportioning the rates in a particular case, shews that the incorporation was not to be made for all purposes; else there would have been a provision for cases in which the place was liable to the debts of the original county, such as, for instance, cases arising under the gaol acts, 4 *G.* 4. *c.* 64., and 5 *G.* 4. *c.* 85. By sect. 38 the new constitution of the boroughs is to come into force only on the first election of councillors: on the construction contended for on the other side, the places added to the boroughs would be without justices from the passing of the act to the first election; for the act contains nothing to enlarge the power of the borough justices in the mean time. Under sect. 62 no borough coroner can be appointed till there is a grant of a court of

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of quarter sessions: if the district is incorporated for all purposes, it will be without a coroner in the mean time. Sect. 64 shews that, for some purposes, the county jurisdiction is preserved, and even enlarged. Sect. 79, in the provision as to recognisances to be taken by the borough constables, treats the boroughs as situate within the county, in the case in which there are no sessions of the peace: the places incorporated, therefore, are not universally and for all purposes out of the county; for the boroughs are not so themselves. Suppose a borough not to apply, under sect. 108, for a quarter session: if the borough be taken out of the county for all purposes, there will be no sessions at which the prisoners can be tried. Sect. 107 excepts, out of the jurisdiction of the borough quarter sessions, all powers and jurisdictions formerly granted to any borough to try capital felonies, &c. Now an exception "is ever of part of the thing granted and of a thing *in esse*" (*Co. Lit.* 47 *a.*); it follows that the power to try offences, granted to the quarter sessions, is, as to local extent, the power which the borough previously had: otherwise, since the borough never had capital jurisdiction out of the old precincts, the exception could not apply. By sect. 109 certain exceptions (including *Bristol*) from the operation of stat. 38 *G.* 3. *c.* 52. *s.* 10. are done away with; and, after *May* 1st 1836, and until a quarter session is granted, *Bristol* will be within the general rule furnished by the act. But up to the first of *May* it will be under the former system: and how can this be applied to districts added to the borough, and taken from the county at large? They come under sect. 111; and, though *Bristol* is exempted from the provisions of stat. 38 *G.* 3. *c.* 52., the new part is not within the exemption.

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emption. Sect. 114 contemplates the connecting, for some purposes at least, of the county jurisdiction with the borough. So does sect. 117; and *Clifton* falls under the case there contemplated; for before stat. 2 & 3 *W.* 4. *c.* 64. it did contribute to the county rates. In sect. 118, if the legislature had intended the courts of record to have jurisdiction over the added districts, it is scarcely probable that they would not have expressly so declared. Sect. 122, on the construction contended for on the other side, is unnecessary; for, if the borough and all the additions are taken out of the county for all purposes, the county has no jurisdiction within the borough. The eighth section, therefore, has not the general effect contended for on the other side. Hardships might, perhaps, be suggested on either construction: thus *Bristol* is excepted from the highway act, stat. 13 *G.* 3. *c.* 78., by sect. 85 of that act; and the argument on the other side would extend that exception to all the incorporated district (*a*).

Cur. adv. vult.

Lord *Denman* C. J. now delivered the judgment of the Court.

We have gone through the act with great care; and the result is, that we find the transfer of jurisdiction, by the 7th and 8th sections, to be as complete as words can make it. With respect to the inconveniences which Mr. *Greaves* has suggested as likely to arise from this construction upon other sections of the act, they must

(*a*) As to the general rules for implying an exclusion of the jurisdiction of county justices, the following cases were cited on moving for the rule. *Talbot* v. *Hubble*, 2 *Str.* 1154.; *Blankley* v. *Winstanley*, 3 *T. R.* 279.; *Rex* v. *Sainsbury*, 4 *T. R.* 451.; *Bates* v. *Winstanley*, 4 *M.* & *S.* 429.; *Rex* v. *Clarke*, 5 *B.* & *Ald.* 665. See *Rex* v. *Shepherd*, 2 *A.* & *E.* 298.

be

be decided upon when they come before the Court. We are, therefore, of opinion that *Clifton* is now a part of *Bristol*, and not of the county of *Gloucester*: and the rule must consequently be discharged.

Rule discharged.

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The KING *against* The Justices of CUMBERLAND.

Monday, February 1st.

A RULE was obtained in a former term, calling upon the justices of *Cumberland* to shew cause why a mandamus should not issue, requiring them to hear the complaint of the overseers of *Wetheral*, in the said county, against *John Bowman*, for refusing to maintain his wife and child. It appeared that the alleged wife, *Sarah*, having become chargeable to *Wetheral*, and *Bowman* refusing to maintain her, the assistant overseer obtained a summons against him, in pursuance of which he attended before two justices at the town-hall of *Carlisle*, where *Armstrong*, the assistant overseer, preferred a complaint against him for the refusal to maintain, under stat. 5 *G.* 4. *c.* 83. *s.* 3. *Bowman*, on being called upon to shew cause for his refusal, denied that *Sarah* was his wife, and stated that she had filiated the child upon him as a bastard; and he produced receipts signed and given to him by *Armstrong*, while assistant overseer of *Wetheral*, for money paid him by *Bowman* on account of the said child, which was described in the receipts as the child of *Sarah Ashbridge*. *Armstrong* did

On complaint against a party as a vagrant, for refusing to maintain his wife, the party charged, being called upon by the justices in petty sessions to shew cause for his refusal, denied being married to the woman, and produced some evidence in support of such denial: and he threatened the magistrates with an action if they committed him. The complainants offered evidence of a *Gretna Green* marriage: but the justices refused to hear it, and dismissed the summons, saying that they would not, on this application, try a disputed marriage, alleged to have taken place out of the country, and that the parties ought to try it in the Ecclesiastical Court:

Held, that the justices could not, under these circumstances, refuse to hear the case through; and a mandamus was granted, requiring them to hear the complaint.

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not deny the receipts, but offered to prove a *Gretna Green* marriage, of which the child was the issue, by the evidence of persons then present, namely, the alleged wife, a subscribing witness to the certificate of marriage, and a witness to subsequent cohabitation. The attorney who attended with *Bowman* said that, if the magistrates committed him, an action would be brought against them. The magistrates, under the advice of their clerk, refused to hear the evidence in support of the marriage, and dismissed the summons, saying, that they thought the matter too important to be decided in this summary manner; that they would not try indirectly the validity of a marriage which was said to have taken place out of *England* and was disputed; and that this question ought properly to be tried in an ecclesiastical court (*a*).

Alexander

(*a*) *Armstrong*, in his affidavit, described the termination of the proceeding as follows: — "That the said *John Bowman* being called upon to answer the charge, Mr. *Wannop*, who appeared as his solicitor, denied that the said *John Bowman* was the husband of the said *Sarah Newman Bowman*, and alleged that they were never married; that the magistrates by the advice of their clerk thereupon refused to enter upon the case, or allow any evidence to be called to prove the marriage, stating that it was necessary in the first place to establish the marriage in the Ecclesiastical Court. That this deponent was prepared to have proved the said marriage," &c. "That this deponent informed the magistrates that he was prepared with such testimony if they would allow it to be heard; but they positively refused, for the reason before stated, namely, that it was necessary, before such application could be made, to establish the marriage in the Ecclesiastical Court." The clerk to the magistrates stated in his affidavit, that Mr. *Saul*, the attorney for *Wetheral*, "proposed to call the said *Sarah Newman Ashbridge* to prove the marriage, but did not deny the fact of the said receipts having been given, or of the said order of bastardy having been made, whereupon the magistrates, *Thomas Atkinson* and *John Knubley Wilson*, Esquires, under the advice of deponent, refused to receive such evidence, considering it a matter of too great importance to try indirectly the validity of a marriage which was alleged to have taken place out of *England*, and which they thought ought more properly to be brought before an Ecclesiastical Court

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Alexander and *W. C. Rowe* now shewed cause. Supposing that the case has not been heard, the magistrates were not bound to proceed when there was reasonable fear of an action, and no indemnity was offered; *Rex* v. *Mirehouse* (*a*). The act 5 *G.* 4. *c.* 83. *s.* 3. does not imperatively require justices to proceed on a complaint of this kind; the words are, "it shall be lawful for any justice of the peace to commit such offender." [Lord *Denman* C. J. The justices here had begun to hear the complaint; were not they bound to hear all?] They exercised a discretion, which they had a right to use. And they have, virtually, heard the complaint. [Lord *Denman* C. J. Then they stopped the party against whom they decided]. The receipts were not denied: then it appeared that there was a disputed marriage, which the parties might try in the ecclesiastical court. [*Coleridge* J. What remedy could the overseers have in the ecclesiastical court?] In *Rex* v. *The Justices of Carnarvon* (*b*), where the sessions, on the trial of an appeal, refused to hear the respondents' witnesses, this Court would not grant a mandamus to enter continuances and rehear the appeal.

Cresswell, contrà, was stopped by the Court.

Court than to be decided by magistrates at a petty sessions." He added his opinion, that the advice he had given was proper, "and that, if the said magistrates heard the evidence proposed to be offered by the said *George Saul*, they must still decline making any order upon the summons, on the ground of the doubtful nature of the question as to the validity of the marriage, and the consequent risk to which the magistrates would be exposed by reason thereof."

(*a*) 2 *A.* & *E.* 632. *S. C.*, as *Rex* v. *The Justices of Somersetshire*, 1 *Harr.* & *Woll.* 82.

(*b*) 4 *B.* & *Ald.* 86.

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Lord DENMAN C. J. That was a very different case. It is quite clear that the justices have done wrong. They exercised their discretion in deciding at first to hear the case; then they were not right in refusing to hear the whole of the evidence offered. The rule must be absolute.

LITTLEDALE, WILLIAMS, and COLERIDGE, Js. concurred.

Rule absolute.

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Justices in petty session having made an order for stopping a highway under a local act giving an appeal, and the time for appeal having elapsed, it cannot be contended, on a prosecution for obstructing such way, that the order was bad because the justices were not properly summoned to the petty session.

Under stat. *55 G.* 3. *c.* 68. *s.* 2., enacting that "when it shall appear, upon the view of any two or more" justices, that a highway is unnecessary, the same may be stopped by order of such justices, the order is not valid if it state only that the justices, *having viewed* the public roads within the parish, &c. (in which the road lies), *and being satisfied* that certain roads after mentioned are unnecessary, do order the same to be stopped up: and the objection may be taken on such prosecution, and at such time, as above.

By a local inclosure act, incorporating (so far as its provisions were not repugnant) the general inclosure act, 41 *G.* 3. *sess.* 2. *c.* 109., it was enacted that certain commissioners might set out and appoint highways over the lands to be divided, &c., within the parish of *E.*, or over any of the old inclosed lands in the parish, and divert or stop up any of the present public or private carriage-roads, highways, or footpaths in the parish, observing certain conditions: and that all ways and paths in the parish not so set out or continued should be stopped up and extinguished, and deemed part of the lands to be divided, &c.: provided that no roads through any old inclosures of the parish should be stopped up, diverted, or altered, without an order of two justices.

A road, A, through old inclosures in the above parish, opened into the waste, and, at such opening, joined another road, B, which formed a continuation of A, and ran entirely over waste land. No valid order was obtained for stopping road A. Road B was not set out or continued by the commissioners: Held, that this omission did not extinguish road A and create a consequent stoppage of road B; but, on the contrary, that A remaining open for want of an order of justices, as a consequence, B remained open also.

Quære, if a road long used as a thoroughfare by the public be lawfully stopped at one end, whether the right of way over the remainder be gone. Per *Patteson J.*, it is not.

INDICTMENT for obstructing and keeping obstructed divers horse and carriage ways, pack and prime ways, and footpaths in the parish of *East-hampstead*, *Berks*. Plea, Not Guilty. By order of

Parke

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Parke J. (*a*) the prosecutor delivered particulars of the ways in question, which were nine in number: seven described generally as highways, and two described as footways. On the trial before *Park* J. at the *Berkshire* Spring assizes, 1834, the following facts appeared. All the ways were ancient public ways.

Highway, No. 1 (*Bond's Lane*), passed through old inclosures, and opened into land which, at the time of making the award after-mentioned, was part of the waste lands in the parish and manor of *Easthampstead*.

Highways 2 and 3, and 4, were continuations of *Bond's Lane*, passing over lands that were waste at the time last-mentioned. (Highway 3 diverged from highway 2: *Bond's Lane* branched into highways 2 and 4.

Highways 5 and 6, the latter being a continuation

(*a*) The order was as follows: —

"The *King* on the prosecution of *William Makepeace*, against the Marquis of *Downshire*.

"Upon hearing Mr. *Mascall*, of counsel for the prosecutor, and Mr. *Richards*, of counsel for the defendant, I do order that, upon production of an affidavit by Mr. *Handley*" (the defendant's attorney), "that on reading the indictment he is unable to understand all the precise tracks indicted, the attorney or agent for the prosecutor shall, at the costs of the prosecutor, within one week after the delivery of a copy of Mr. *Handley's* affidavit to Mr. *Jeyes*" (the attorney for the prosecution), "deliver to the defendant's attorney a particular, in writing, of the several highways, pack, and prime ways, and footways, for the obstruction of which the bill of indictment has been preferred and found; and that the prosecutor shall be precluded, at the trial of the indictment, from giving evidence respecting any other highways, pack and prime ways, and footways, than those named in the particular. The prosecutor, with his attorney and one surveyor, to be at liberty to go on the premises on some one day, having given the defendant or his attorney two days' previous notice of the time at which they will attend, and doing no unnecessary damage to the premises. Dated the 30th day of *January* 1834. *J. Parke.*"

See *Rex* v. *Curwood*, 3 *A.* & *E.* 816.

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of 5, passed over lands that were waste at the time last-mentioned; these highways branched from highway 7, and formed a continuation of *Hatch's Lane*, which was a road passing through old inclosures, and not now in question.

Highway 7 passed out of *Hatch's Lane*, through old inclosures, and formed a continuation of *Hatch's Lane* to the northward; branching, to the westward, into highway *5*.

Footways 1 and 2 passed through old inclosures.

By stat. 1 & 2 *G.* 4. *c.* 32. private, "for inclosing lands within the manor and parish of *Easthampstead*, in the county of *Berks*," after reciting that there were within the said manor and parish certain open and common fields and commons, heaths, and other uninclosed commonable lands and waste grounds, containing in the whole &c., and that the Marquis of *Downshire* was lord of the said manor, and as such entitled to the soil of the said commons, heaths and other uninclosed commonable lands and waste grounds, that the Marquis and others were entitled respectively to parcels of the said open and common fields, and were or claimed to be entitled to or interested in the herbage upon, and certain rights of common over, the said open and common fields, and common or waste lands, or some part or parts of them; reciting also the general inclosure act, 41 *G.* 3. *sess.* 2. *c.* 109.; and that the estates of the several parties lay intermixed, &c., and that if the common fields, commons, &c., were divided, allotted, and inclosed, they would be of greater value; it was enacted that certain persons should be commissioners for putting the act in execution in such manner, and with such powers, &c., as were in this act after contained,

contained, and with such of the powers, and subject to such of the rules, &c., contained in the recited act, as were not repugnant to, or altered, or otherwise provided for, by this act.

And by sect. 18. it was enacted (*a*): "That the said commissioners shall, and they are hereby authorised and required in the first place, before they shall proceed to make any of the divisions and allotments, directed to be made by this act, to set out and appoint all and every such public carriage roads and highways, in, through, and over the lands and grounds hereby directed to be divided and allotted, or in, through, and over any of the old inclosed lands or grounds within the said parish, as they shall judge necessary, and to divert, alter, turn or stop up any of the present public or private carriage roads or highways, or footpaths, in, through, or over any part of the said parish of *Easthampstead* as the said commissioners shall think proper, provided the roads and highways to be set out and appointed by the said commissioners, shall be and remain thirty feet wide, at the least, and be set out in such directions, as shall upon the whole, appear to them most commodious to the public; and the said commissioners shall ascertain the same by marks and bounds, and prepare and sign a map, in which such intended roads shall be accurately laid down and described, and cause the same, when so signed, to be deposited with their clerk, for the inspection of all persons concerned; and as soon as may be afterwards, the said commissioners shall give notice;" (directions were then added for giving public notice of the setting out of such roads

(*a*) See the General Inclosure Act, 41 *G.* 3. *sess.* 2. *c.* 109. *ss.* 8, 11.

and

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and depositing of such maps, and also notice of the general lines of such intended carriage roads;) "and shall also appoint, in and by the same notice, a meeting to be held by the said commissioners, at some convenient place," &c. "and not sooner than fourteen days from the date and publication of such notice, to take the same into consideration; and if any person who may be injured or aggrieved by the setting out of such roads, shall attend at such meeting, and object to the setting out of the same, then the said commissioners, together with any justice or justices of the peace, residing or acting in and for the division in which the said parish of *E.* is situate, and not being interested in the said division and allotment, shall hear and determine such objection, and the objections of any other such person to any alteration, that the said commissioners, with any such justice or justices, may in consequence propose to make; and the said commissioners, together with such justice or justices as aforesaid, shall, and they are hereby required, according to the best of their judgment, upon the whole, to order and finally direct how such carriage roads shall be set out, and either to confirm the said map, or make such alterations therein as the case may require. And all roads, highways, ways and paths, in through and over the said parish of *E.*, or any part thereof, which shall not be set out, or finally ordered and directed to be set out or continued as aforesaid, shall be for ever stopped up and extinguished, and shall be deemed and taken as part of the lands and grounds to be divided and allotted by virtue of this act, and shall be divided and allotted accordingly: Provided always, that none of the present roads" in *E.* shall be shut up or discontinued, until the

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roads intended to remain or be the public roads in future shall be set out as by this act directed, and properly formed and made safe and convenient for horses, cattle, and carriages: "Provided also, that no roads passing or leading through any of the old inclosures within the said parish, shall be stopped up, diverted, turned, or in any other way altered, without an order for that purpose, under the hands and seals of two of his Majesty's justices of the peace for the said county of *Berks*, not interested in the repair of such roads, in the manner and subject to appeal, and giving such notice as is directed by an act passed," &c., *55 G. 3. c.* 68.

The commissioners set out a number of public carriage roads or highways, and likewise certain private roads, which were drawn out on a map, and the map, after notice given and a meeting held according to the act, was duly confirmed. Among the roads marked as private was *Bond's Lane* road, described by the commissioners as a "private occupation road or driftway of the width of twenty-five feet," except where it passed through old inclosures, leading from one to another of the public carriage ways newly set out as above stated. Part of this road was comprised in highway No. 1 (*Bond's Lane*), and part in highway No. 4, above described as a continuation of *Bond's Lane* over the waste. Three other roads (*East Hampstead Park Road, East Hampstead Park Lane Road,* and *Jenning's Hill Lane Road*) were set out in like manner as private, and these were comprised in highway No. 7, above described. Highways 2, 3, 5, and 6, and footways, 1 and 2, were not set out.

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For the purpose of stopping certain of the above ways which passed through old inclosures (according to the proviso in sect. 18. of the local act), three justices, at a petty session holden *March* 23d, 1827, made the following order: — "*Easthampstead* Inclosure. We *Augustus Schutz* Esquire, *Thomas Garth* Esquire, and the Reverend *Henry Ellis St. John*, clerk, three of his Majesty's justices," &c., "at a special session held by us at" &c. "on this 23d day of *March* 1827, in pursuance of the authority vested in us in and by an act," &c. (reciting the local act 1 & 2 *G.* 4. *c.* 32., and statutes 41 *G.* 3. *sess.* 2. *c.* 109. and 55 *G.* 3. *c.* 68); "or any of them, having particularly viewed the public roads and footway within the said manor and parish of *Easthampstead* hereinafter particularly described; and we not being interested in the repair of the said roads and footway, and being satisfied that the highways, bridleways, and footways intended to remain and be the public highways, bridleways, and footways in future within the said parish are continued, or have been set out and properly formed and made safe and convenient, according to the provisions and directions of the said first mentioned act, and that the roads and footways hereinafter described are unnecessary to be continued, do order that the same public roads and footways be stopped up and extinguished, that is to say," *Easthampstead Park Road*, leading &c. (describing its direction and termini as the commissioners had stated them in setting out this road as above mentioned; p. 703.); *Easthampstead Park Lane Road* (describing it in like manner); *Jenning's Hill Lane Road* (describing it in like manner): footway, &c. (describing its course and termini).

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termini). "So that the same roads and footway may be divided and allotted pursuant to the directions of the said first mentioned act of parliament. Given," &c.

Signed by the three justices.

The roads were No. 7, of the highways, and the footway No. 2, of the footways, in question on this indictment. One of the magistrates summoned to the petty session was not served with the summons till *March* 20th. The order was confirmed, without appeal, at the quarter sessions, holden *April* 24th.

The commissioners executed their award, *August* 1st, 1827, specifying therein the several public carriage roads or highways and private roads set out and described by the said commissioners as above mentioned. And, after referring to two orders of justices, made in 1825 (of no importance here), the award proceeded as follows:—"And whereas, in further pursuance and execution of the said three several acts," &c., *Augustus Schutz*, &c., "three of his Majesty's justices of the peace for the said county of *Berks*, at a special session held by them in the parish of *Easthampstead* aforesaid, on" &c. "did order that the several public roads and footway therein and hereinafter described, be thenceforth stopped up and extinguished, that is to say" (then followed a description of the ways mentioned in the order of *March* 23d 1827, in the words there used); "and whereas the said last-mentioned order at a general quarter sessions of the peace, holden at *Newbury*, in and for the said county of *Berks*, on *Tuesday*, the 24th day of *April* last, was confirmed, filed, and enrolled among the records of the said sessions: now be it further known that the said *Thomas Chapman* and *Richard Crabtree*, as such commissioners as aforesaid, do hereby declare

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declare and award that the said several roads in the said three several orders, or either of them, particularly mentioned and described, shall be for ever stopped up and extinguished as public roads; and that the said three several last-mentioned roads, called *Easthampstead Park Road*, *Easthampstead Park Lane Road*, and *Jenning's Hill Lane Road*, shall be for ever hereafter for the exclusive use and occupation of the person or persons whose lands adjoin thereto on either side thereof, and that the said several footways in the said three several orders, or either of them, particularly mentioned and described, shall be for ever stopped up and extinguished."

The waste lands, over which highways 2, 3, and 4, and highways 5 and 6, passed, were allotted to the defendant.

The defence was, that highways, 1 to 6, and footway 1, were stopped by the award and the operation of the local act; that highway 7 and footway 2 were stopped by the order of justices; and that the stopping of these ways had an effect, in addition to that of the award and Inclosure Act, in extinguishing highways 5 and 6.

The jury found that all the roads which had been the subject of proof were ancient ways; and, under the learned Judge's direction, they returned a verdict of Not Guilty, leave being reserved to the prosecutor, by consent, to move to enter a verdict of Guilty.

Ludlow Serjt., in *Easter* term, 1834, moved accordingly (*a*). He contended, as to highway 7 and footway 2, that the order of justices was bad, because the

(*a*) Before Lord *Denman* C. J., *Littledale*, *Parke*, and *Patteson* Js.

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summonses to the magistrates to attend the petty session were not all delivered in proper time; and because it did not appear, by the order, that it was made upon view, as required by stat. 55 G. 3. c. 68. He took some other objections to the order, upon which the Court gave no opinion (a). He further urged that part of the recital, made by the commissioners in their award, was unsupported by any further proof. *Parke* J. observed that the award was primâ facie evidence of the facts recited in it; and no further notice was ultimately taken of this head of objection. As to highway 1 (*Bond's Lane*), and footway 1, he objected that, as they ran between old inclosures, they could not, by the local act, be stopped without an order of justices; and further, as to highway 1, that, although the commissioners had professed to set it out as a private occupation way, they had not allotted the soil, and that the new denomination they had given it did not, under the circumstances, deprive it of the character it anciently had, of a public highway. And, as to highways 2, 3, 4, 5, 6, he contended that if highways 1 and 7 were not legally stopped, these, being continuations of them, remained open likewise. A rule nisi was granted, against which

Jervis, *R. V. Richards*, and *Talbot*, shewed cause in *Trinity* term 1835 (b). First, as to the objections to

(a) One of these was, that several roads were stopped by the same order. See *Rex* v. *Milverton*, *Mich. T.* 1836, where it was held that such an order is bad.

(b) Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Williams* Js. The case was argued, *June* 1st and 2d.

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the order of justices. It is contended that the summonses to attend the special session appear not to have been all served in reasonable time, and, therefore, that the quarter sessions ought not to have confirmed the order, on which point *Rex* v. *The Justices of Worcestershire* (*a*) was cited. But no precise rule is there laid down as to the time at which service shall be deemed reasonable; nor can there be a general law on the subject. *Rex* v. *Sheppard* (*b*) and *Rex* v. *The Justices of Surrey* (*c*) were also cited: but, in the one case, the order did not purport to have been made at a special session at all; in the other, notices had not been served by the proper officer. Neither case is applicable. And the present objection, if available, should have been made the ground of an appeal: the justices in sessions are the proper persons to judge of it. By stat. 55 *G.* 3. *c.* 68. *s.* 4., which is incorporated by reference in sect. 18 of the present act, if there be no appeal, the order and proceedings are conclusive. On the objection, that the order does not sufficiently appear to have been grounded on the view of the justices, a later case of *Rex* v. *The Justices of Worcestershire* (*d*) was cited. But there the words of the order were: — "We — having upon view found, *or* it having appeared to us;" the justices did not even assert that they had viewed. Here they say, "We — having particularly viewed the public roads and footway;" "and we, not being interested" — "and being satisfied that the highways," intended to be the public highways in future, are properly formed, do order, &c. Of the two analogous forms (xvi and xviii),

(*a*) 2 *B.* & *Ald.* 228.
(*b*) 3 *B.* & *Ald.* 414.
(*c*) 5 *B.* & *C.* 241.
(*d*) 8 *B.* & *C.* 254.

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in the schedule to stat. 13 *G.* 3. *c.* 78., one, No. xvi, uses the words, "having upon view found;" but those particular words are not absolutely necessary; and stat. 55 *G.* 3. *c.* 68. gives no form of an order for stopping. The argument on the other side seems to assume that the view and the order must take place at once, and the order be worded accordingly; but that is not required.

The main question, however, is, whether the highways 1 to 6 are extinguished by the inclosure act and award. Now supposing that highway 1 (*Bond's Lane*) was not legally stopped, for want of an order of justices, it does not follow that highways 2, 3, and 4, which communicated with it, and ran over the waste, and were not set out as public roads by the commissioners, remained open also. This point arose in the case of *The Marquis of Downshire* v. *Makepeace*, tried at the *Reading* Spring assizes 1832, where the present defendant brought trespass against the present prosecutor, and he pleaded a right of way on the same highways which are called 2 and 3 in this cause. *Littledale* J., in summing up that case to the jury, adverted to the argument on behalf of the plaintiff, which was that, when the legislature gave power to the commissioners, generally, to stop up roads leading over the lands to be allotted, and empowered them also to stop up roads leading through old inclosures by an order of two justices, the restriction, as to the order of justices, must be confined in its effect to the roads actually within the old inclosures; and the learned judge added, "I must own that appears to me the right construction of the act; for it would come to this, that almost all the roads in the lands or commons to be inclosed would lead by one

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means or the other into roads in the old inclosures, and the result would be, that there could scarcely be a road set out in the whole inclosure except by the concurrence of two justices; and therefore it appears to me the true construction of the act, that this power for stopping up roads in the old inclosures requiring the concurrence of two magistrates, is to be confined to roads of the old inclosures" (*a*). That argument applies both to highways 2, 3, and 4, and to highways 5 and 6. They are extinguished by the award and inclosure act, independently of any circumstance affecting the condition of highway 1 (*Bond's Lane*) and highway 7, with which they respectively communicate.

Then, as to highway 1 (*Bond's Lane*). Not only is the stopping of *Bond's Lane* unnecessary for the purpose of stopping roads 2, 3, 4, but, on the other hand, admitting that *Bond's Lane*, so far as it passes through old inclosures, would not be stopped by the mere omission of it in the award, it is in effect stopped, because the roads on the waste, highways 2 and 4, which were the continuations of *Bond's Lane*, are extinguished as public ways by the award. *Bond's Lane*, then, becomes a mere cul de sac; and such a place cannot be called a highway. In *Wood* v. *Veal* (*b*) *Abbott* C. J. said, "I have great difficulty in conceiving that there can be

(*a*) From the note used by the defendant's counsel in opposing the present rule. A rule nisi was obtained for a new trial in *The Marquis of Downshire* v. *Makepeace* (the plaintiff having obtained a verdict); and, upon cause shewn, *Hil. T.* 1833, the rule was discharged; but it does not appear that the Court decided the above point. *Parke* J. observed, upon the motion, that, according to the argument used, probably no road in the district could be stopped, since every highway would lead to *some* road passing through old inclosures.

(*b*) 5 *B.* & *Ald.* 454.

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a public highway which is not a thoroughfare." *Logan* v. *Burton* (*a*) is distinguishable. There a clause in a local inclosure act enabled commissioners to stop up old roads in the parish, "besides the roads which passed over the lands to be inclosed," provided it were not done without the concurrence of two justices; and this was held not to be confined to roads lying wholly without such lands; the Court being of opinion that, where a road passed partly through such lands and partly through others, the consent of two justices was requisite for stopping the latter portion; because otherwise, by stopping this, the whole might, in effect, be stopped without such consent. That, however, does not shew that, because highway 1 (*Bond's Lane*) passes through old inclosures, therefore highways 2 and 4, which communicate with it, could not be stopped without an order of justices, and, being so stopped, produce a consequent stoppage of *Bond's Lane*. The powers given by the local act in that case were only an extension of the same powers which are conferred by sections 8, 10, and 11, of the general act, 41 *G.* 3. *sess.* 2. *c.* 109.; here the authority of the commissioners is derived from the local act, 1 & 2 *G.* 4. *c.* 32. *s.* 18, which re-enacts the general inclosure act, but with alterations. It empowers the commissioners not only to set out and appoint highways over the *lands to be inclosed* (which is the authority given by the general act), but to divert, alter, turn, or stop up any of the present highways over any part of the parish; and it enacts that all highways in, through, or over the said *parish*, or any part thereof, which shall not be set out, or finally

(*a*) 5 *B.* & *C.* 513.

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ordered to be set out and continued as aforesaid, shall be for ever stopped up and extinguished. This last provision is independent of their direct power to stop: and the powers given by the clause affect the inclosed lands as well as those to be allotted, except so far as they are controuled by the proviso that no road between old inclosures shall be stopped, &c., without an order of justices. But here the road between old inclosures is not touched by the commissioners; only the continuation of it over the waste is stopped, by not being preserved, and, in consequence, *Bond's Lane* ceases to be a thoroughfare, and comes within the dictum of *Abbott* C. J. in *Wood* v. *Veal* (*a*). In producing that result, the commissioners do not overstep the particular limitation imposed by the proviso. Besides, this case cannot be assimilated to *Logan* v. *Burton* (*b*) without contending that the highways which form the continuation of *Bond's Lane* over the waste are one and the same with it; but this would be like arguing that the whole road from *London* to the north of *England* was one with *Portland Place*. The same observations will apply to *Harber* v. *Rand* (*c*) and *Thackrah* v. *Seymour* (*d*), as to *Logan* v. *Burton* (*e*). The effect of omitting to set out a formerly existing way, under the general inclosure act, was considered in *White* v. *Reeves* (*g*). [*Patteson* J. *Bond's Lane* is found to have been formely a public road. The commissioners have not omitted it in their award, but have assumed to make it a private way, or at least treat it as such.] When the continuation over the waste was stopped, *Bond's Lane* became a cul de sac, and there-

(*a*) 5 *B.* & *Ald.* 454.
(*b*) 5 *B.* & *C.* 513.
(*c*) 9 *Price*, 58.
(*d*) 1 *Cro.* & *M.* 18.
(*e*) 5 *B.* & *C.* 513.
(*g*) 2 *B. Moore*, 23.

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fore was as if it had never been public. Under those circumstances the commissioners set it out as an occupation road. Supposing that they had not power to do so, they have not the less stopped it, as to the public, which they had authority to do. [*Patteson* J. It has been held that, where there never was a right of thoroughfare, a jury might find that no public way existed; but it has never been settled that, where there had been a public right of passing through, the right of way was abolished by stopping one end of the passage.] It is to be assumed that the stoppage is made legally. [*Patteson* J. That would not make the remaining passage not public. And here, if *Bond's Lane* was in effect stopped, it should have been allotted according to the local act.] That provision does not apply where the way is merely stopped by operation of law. [*Patteson* J. The commissioners have thought this a private road, and treated it as such; and it now turns out to be public. We must deal with it as we can, under the circumstances.]

Then, as to footway No. 1. That is extinguished by the award and local act, not being set out. It is true that no order of justices was obtained for stopping it, and that it passes through old inclosures: but the proviso, that no "roads" passing through old inclosures shall be stopped without such order, applies only to horse and carriage roads. A distinction is made between footpaths and roads in the beginning of sect. 18, where the commissioners are authorised to "set out and appoint all and every such public carriage roads and highways" over the lands to be allotted, or through the inclosed lands, and to divert, alter, turn, or stop up "any of the present public or private carriage roads

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or highways, or footpaths," "provided the *roads and highways* to be set out by the said commissioners shall be and remain thirty feet wide at the least." The same kind of distinction runs through the rest of this section. [*Patteson* J. Acts of parliament are so loosely worded that an argument from the use of one word in one part of a clause, and another in another, has not much weight with me. I should take "road," here, to mean any thing over which the public has any right to go. *Littledale* J. The last proviso in the section requires an order in the manner directed by stat. 55 G. 3. c. 68, which does extend to footpaths.]

Ludlow Serjt., Sir *W. W. Follett*, and *Maclean*, contrà. First, as to the order of justices for stopping highway 1, and footway 2. The lapse of time may perhaps be an answer to the objection on the insufficiency of the summons. [Lord *Denman* C. J. We are all of opinion that the order cannot be questioned at this distance of time, unless it be defective on the face of it, or there distinctly appear a want of jurisdiction (*a*).] Then, as to the allegation of view. It is true that *Rex* v. *The Justices of Worcestershire* (*b*) differs from this case, because there the fact of view was only stated alternatively. But *Bayley* J. says there that "the justices have no jurisdiction to stop up the highway unless they pursue the power given to them by the legislature;" and that they ought "to shew on the face of the order that they have had a view, and that it had appeared to them *on view* that the highway was unnecessary. They ought either to use the words

(*a*) See *Rex* v. *The Justices of Cambridgeshire*, antè, p. 111.

(*b*) 8 *B.* & *C.* 254.

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of the act of parliament, or other words of equivalent import." Here, so far as can be collected from the order, the justices may have viewed the road, but have been satisfied by other evidence that it was unnecessary.

Then, as to the other highways. It is said that *Bond's Lane* was made a cul de sac. If by that process it was stopped, it has been stopped without an order of justices; and, as the road lies through old inclosures, the proceeding is void. The commissioners could not do indirectly what they might not do directly. And, if it was not stopped, the public has still a right to use it. *Wood* v. *Veal* (*a*) is no authority; there the question was, whether the public had acquired a new right by dedication: here the public has clearly had the right; and the question is, whether the proceeding adopted had taken it away. At least the public might continue to go as far as the point where the stoppage is said to have taken place. If the effect of extinguishing the roads over the waste be to stop *Bond's Lane* altogether, it follows that those roads could not legally be extinguished. This was the view taken of a similar case by the Court of Exchequer, in *Thackrah* v. *Seymour* (*b*), where Lord *Lyndhurst* observed, that "no power was given to the commissioners to stop up the part of the way passing over the old inclosures; yet, if they stopped up the part which led over the waste lands, they would thereby, in effect, stop up the way which passed over the old inclosures." [*Williams* J. It is difficult then to say what effect could be given to the power of stopping roads over the waste; for there can scarcely be a road confined to the waste, and not leading somewhere else.

(*a*) 5 *B.* & *Ald.* 454. (*b*) 1 *Cro.* & *M.* 18.

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Littledale J. According to the argument, a consent of justices would be necessary for almost every road that is stopped or discontinued.] The power to stop without an order of justices was probably meant to apply to private roads over the waste, which often have no communication with the roads passing between inclosures; and to public tracks, also running over the waste, and merely connecting the greater highways. But if highways actually leading through old inclosures may be stopped incidentally, by extinguishing those highways over the waste which are continuations of them, the whole traffic of the district may be intercepted, notwithstanding the provisoes in the acts of parliament, by the mere silence of the commissioners in their award. This appears to have been the view taken by the Courts of Exchequer and King's Bench of the cases of *Harber* v. *Rand* (*a*), and *Logan* v. *Burton* (*b*); and the difference relied upon, between the General Inclosure Act and the local act here in question, is not sufficient to distinguish those cases from the present.

Then, as to footway No. 1. The words "highways" and "roads," in sect. 18. of the local act, are loosely employed; but it is expressly said, that "all roads, highways, ways, and paths," not set out or continued under this act, shall be stopped up and extinguished; and in the final proviso, requiring an order of justices, "roads" is used as a nomen generalissimum, including every kind of way before mentioned. There is no reason that the protection given by the proviso for the public benefit should not extend to footpaths. The proviso refers to stat. 55 G. 3. c. 68., which includes every de-

(*a*) 9 *Price*, 58. (*b*) 5 *B.* & *C.* 513.

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scription of way. And *Thackrah* v. *Seymour* (*a*) shews that, under the General Inclosure Act, if a footway runs partly through old inclosures and partly over waste, the mere silence of the commissioners in their award will not extinguish such a way.

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Cur. adv. vult.

Lord DENMAN C. J. in this term (*January* 26th) delivered the judgment of the Court.

This was an indictment against the defendant for obstructing certain footpaths and highways in the parish of *Easthampstead*, in the county of *Berks*, tried before my brother *Park* at the Spring assizes at *Reading* 1834, when a verdict was found for the defendant, with liberty for the prosecutor to move this Court to enter a verdict of Guilty as to all or any of the said roads which, upon the evidence, should not appear to have been legally stopped.

The roads were nine in number; that is to say, Nos. 1 and 2 footways (as laid down in the plans both of the prosecutor and defendant, which agreed), and numbers from 1 to 7 inclusive, highways, the former (No. 1.) being called in the evidence, and upon the plans, *Bond's Lane*, the latter (No. 7.) being called in the report "the road to the North," and, by the plans also appearing to go in that direction. Into No. 1 highway (*Bond's Lane*) ran the roads over certain commons, before their inclosure designated by the Nos. 2, 3, and 4, in both the plans respectively; and into No. 7, or "the road to the North," ran the Nos. 5 and 6, also passing over commons, and also laid down

(*a*) 1 *Cro. & M.* 18.

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in the plans of the prosecutor and defendant. As to the roads generally, they were found by the jury, or admitted by the defendant's counsel, to have been public; that is to say, the two first mentioned to have been public footways, and the seven last mentioned to have been public highways. The burthen therefore of shewing that they ceased to be such, or, in other words, had been legally stopped, clearly lay upon the defendant.

For this purpose, as to No. 2 footway and No. 7 highway, a certain order of justices, bearing date 23d of *March* 1827, was relied upon; and as to the Nos. 5 and 6, before described as leading into No. 7, that they were virtually stopped by the same order. As to the rest, viz. No. 1 footway, and No. 1 highway (*Bond's Lane*), and Nos. 2, 3, and 4, leading into it, certain acts of commissioners, under statute 2 G. 4. session 1821, intituled "An Act for inclosing lands within the manor and parish of *Easthampstead*, in the county of *Berks*," were relied upon. Indeed it was, by some of the counsel for the defendant, contended that what had been done under the above cited act was effectual for stopping *all* the roads; and that the order of justices, as to those to which it applied, was ex abundanti cautelâ only, and superfluous.

It may therefore be convenient perhaps, first, to consider the last-mentioned ground of defence, applicable to all. By the act in question (ps. 12. and 13.) commissioners are empowered to make new roads, and also, "to divert, alter, turn, or *stop up* any of the present public or private carriage roads, or highways, or footpaths" over the said parish of *Easthampstead*, as they shall think proper. They are also directed to pre-

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pare and sign a map, describing the roads, and to give certain notices therein prescribed; and to hold a meeting for the purpose of hearing objections and complaints, in which they are to be assisted by a justice or justices of the peace for the division in which the said parish of *Easthampstead* is situate: the said commissioners and such justice or justices to have power to confirm or alter the said map. Then comes the clause upon which reliance on behalf of the defendant is placed: "And all roads, highways, ways, and paths in, through, and over the said parish of *Easthampstead*, or any part thereof, which shall not be set out, or finally ordered and directed to be set out and continued as aforesaid, *shall be for ever stopped up and extinguished*, and shall be deemed and taken as part of the lands and grounds to be divided and allotted by virtue of this act." It has therefore been argued that, as none of these roads have been set out and continued, they are at once extinguished. We think, however, it is unnecessary to do more than to refer to the proviso contained in the very clause which confers the above mentioned powers upon the commissioners, for the purpose of shewing that the argument has no weight:—"Provided also, that *no* roads passing through any of the *old inclosures* within the said parish, shall be *stopped up*, diverted, turned, or in any other way altered, *without an order* for that purpose under the hands and seals of two of his Majesty's justices of the peace for the said county of *Berks*;" which is to be subject to appeal in the manner directed. We consider this to be decisive; and that, consequently, as to No. 1 footway, and No. 1 highway (*Bond's Lane*), which are uncovered by any such order, they still exist in point of law, as a foot and highway respectively,

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respectively, passing as they do undoubtedly, according to *both* the plans, through *old inclosures*. It is scarcely necessary to add, that the force of this proviso seems to have been felt, or else why was an order of justices procured for Nos. 2 and 7 (foot and highway) respectively?

We are next to consider the effect of No. 1 highway (*Bond's Lane*) existing still, so far as Nos. 2, 3, and 4 highways, leading into it, are concerned. We call them highways, because, as has already been observed, they were found or admitted to be so, subject, of course, to the effect of the proceedings which we have already noticed. Their leading over commons is clearly a circumstance wholly immaterial as to their character of public highway or not; and assuredly they may, and indeed must, be such, if, in the direction leading from *Bond's Lane*, they terminate (as in *Bond's Lane* they do) in an ancient and public highway; the consequence therefore seems to be, and we think is, that, *Bond's Lane* still remaining in law a highway, those above mentioned (2, 3, and 4,) remain so likewise. It seemed at first as if another course (laid down upon the prosecutor's plan) had been intended to be substituted for, and to supersede, the last mentioned roads, Nos. 2, 3, and 4. It is obvious, however, that this cannot be, for there is no *public* communication between that course which we are noticing and *Bond's Lane*, that communication (such as it is) being expressly laid down as a *private road*.

We are, lastly, to examine the effect of the order of justices, above adverted to, by which (independent of the supposed stoppage by their not being continued as roads by the commissioners) No. 2 footway, and

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No. 7 highway, are supposed to have been legally stopped, or, in other words, we are to examine the validity of the order of justices. That order is, (His Lordship here read it). Now, in ascertaining how far this order can be sustained, or not, it is to be premised that it must be made "upon view" of the justices. So says the statute; and accordingly we consider that an enquiry is not open to us, whether any other mode of proof be sufficient to inform and satisfy them. Actual inspection is to be the foundation of their jurisdiction: and perhaps a knowledge of the state of the country (necessary and commodious passage and communication, &c.) may be better so acquired, than otherwise: —so it is written, however. Now, upon this subject of the *jurisdiction* of justices of the peace, we are not aware that there is any material distinction of this Court between the mode of construction of an order of justices, and a conviction by them, whatever favourable intendment may be made in support of the former, when once the essential point of jurisdiction is established. See the case of *Rex* v. *Hulcott* (*a*) upon this point. This point, therefore, being (as we conceive it is) perfectly clear, the question is, whether the original allegation of *a particular view* does necessarily, or by fair construction, extend over the whole order up to the passage which directs the stoppage: or, rather, does not the statement of "being satisfied" &c. stand wholly independent of the original allegation of view? Whatever might have been the inference, if the recital had been continued in an unbroken chain from the beginning to the end, the case is otherwise here. The clause containing

(*a*) 6 *T. Rep.* 583.

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the original and material allegation of a "view" is separated in a very marked manner from that wherein the *satisfaction* of the justices, and the grounds of it, are contained. It would be a very violent and forced construction, as we think, to refer the grounds of the procedure by the justices *to the view*, in the earlier part of the order, rather than to some other means, by which their judgment was influenced, and themselves "satisfied," as declared in the subsequent part of that order. We think that it does not, by any fair or reasonable inference (and such only ought we to apply) follow, that the motive, operating upon the justices, was the view only. They might, consistently with a fair and reasonable construction of the order, have been influenced by *other* proof. If so, the justices never obtained jurisdiction over the subject, and their order cannot be supported (*a*). And that is our opinion; and, therefore, No. 2 footway, and No. 7 highway, stand in the same position as the other roads, respecting which we have already pronounced our opinion. We have only to add that, the effect of the order of justices being removed, Nos. 5 and 6 (branches, if they may be so called, of No. 7, because leading into it) are in the same situation, with respect to No. 7, that 2, 3, and 4, are with respect to No. 1 highway, *Bond's Lane*. It is not necessary, therefore, to repeat the reasons which induce us to arrive (as to them) at the same conclusion.

The result therefore is, that a verdict must be entered for the Crown, as to all the roads above particularly specified.

Verdict to be entered for the Crown.

(*a*) See *Rex* v. *The Justices of Cambridgeshire*, ante, p. 111.

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Monday, February 1st.

INDICTMENT for not repairing a highway. On the trial before *Gurney* B., at the *Lancaster* Spring assizes 1833, a verdict was found for the Crown, subject to a special case, by which the following facts appeared: — The road indicted was made under an act, 45 *G.* 3. *c.* vii. (local and personal, public), for making and maintaining a road from *Hollinwood* to *Featherstall*, in the county of *Lancaster*, and branches to communicate therewith. That act was repealed by stat. 7 & 8 *G.* 4. *c.* lv. (local and personal, public), for making and maintaining a road from *Hollinwood* to *Littleborough*, and other roads communicating therewith. And that act was repealed by stat. 11 *G.* 4. and 1 *W.* 4. *c.* xcii. (local and personal, public), for improving and maintaining the road from *Werneth* to *Littleborough*, and other roads communicating therewith. The operation of the two last-mentioned acts was to alter the course of road contemplated in the original act, by substituting *Littleborough* for *Featherstall* as a terminus in one direction, and *Werneth* for *Hollinwood* in the other; and by making a corresponding change of line near the two extremities of the road, the new line to *Littleborough* commencing at *New Hey*, and that to *Werneth* near *Dryclough*. The act, 7 & 8 *G.* 4. *c.* lv., contained a clause, directing that it should be put in execution, among other things, for improving, repairing, &c., the roads leading from *Dryclough*

Where trustees are authorised to make a turnpike road from *A.* to *C.*, the entire road must be completed before the public can be compelled to repair any part. Although the road from *A.* to *B.* (an intermediate point) has been finished between twenty and thirty years, and repaired from time to time by the public; and although the road at point *B.* joins another public road which is complete.

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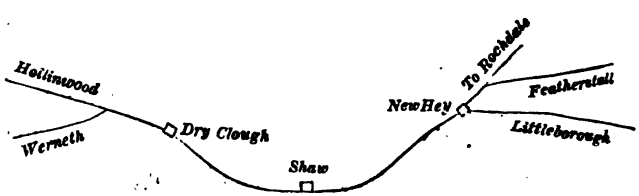
clough through *Shaw*, *New Hey*, &c., to *Rochdale* (*a*). The act, 11 *G.* 4. and 1 *W.* 4. *c.* xcii., contained a clause declaring that it should be put in execution, among other things, for improving, repairing, &c., the road leading from *Dryclough*, through *Shaw*, to *New Hey*. The road containing the portion indicted was part of the line of road so described in the two last-mentioned acts. The whole of this line of road was properly made and completed in 1806, from which time hitherto it has constantly been open to and travelled over by the public, and used as a public road between *Dryclough* and *New Hey*, at both of which places it joins other lines of public roads. Many houses, and some cotton mills, have been erected at the sides of it; and during the whole of this period, until the middle of 1832, the necessary repairs have from time to time been done to it by or at the expense of the respective parishes, townships, or divisions through which the road passes; and this road forms a communication between the several places through which it passes and the public roads at *Dryclough*, *Shaw*, *New Hey*, and *Rochdale*. Many of the new lines of road and the branch roads mentioned in the acts of parliament are still unfinished; but some have been finished. The want of repair was admitted; and *Edge Lane* was a district repairing its own high-

(*a*) The subjoined sketch may shew more clearly the directions of the several lines of road, and the situations of the places mentioned.



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ways. A plan, which was agreed upon, formed part of the case. It appeared by the plan, that two parts of the line of road finally contemplated between *Werneth* and *Littleborough*, viz. the portion at one extremity, from *Dryclough* to *Werneth*, and the portion at the other extremity, from *New Hey* to *Littleborough*, were unfinished. The question for the Court was, whether the defendants were liable to repair the portion of road indicted. The case was argued this term (*a*).

Wightman, for the Crown. The defence to this indictment is grounded on *Rex* v. *Cumberworth* (*b*). But that was the case of a single line of road, part of which was unfinished. Here the acts of parliament contemplate not one line, but a system of roads, including several distinct lines and branches of road. He then contended that, in point of fact, and by the construction of stat. 11 *G.* 4. & 1 *W.* 4. *c.* xcii., referring to the intended lines between *New Hey* and *Littleborough* in one direction, and *Dry Clough* and *Werneth* in the other, these two lines were distinct roads. He relied in particular on a clause, where, in imposing tolls, "the line of road from *Werneth* to *Dry Clough*," "the line of road from *Dry Clough* to *Shaw*," "the line of road from *Shaw* to *Littleborough*," &c. were treated as separate roads (*c*). The noncompletion of one independent road cannot

(*a*) *January* 27th. Before Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* Js.

(*b*) 8 *B.* & *Ad.* 108.

(*c*) The clause referred to was as follows: — "That it shall not be lawful for the said trustees," &c. "to demand or take the respective sums or tolls aforesaid, at any greater number of gates than is hereinafter mentioned, for or in respect of the same horses," &c. "passing or repassing once through all the toll-gates," &c. "along the whole line of

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cannot excuse the inhabitants of the district from repairing another. The decision in *Rex* v. *Cumberworth* (*a*) proceeded on the authority of the previous case, *Rex* v. *Hepworth* (*b*). Lord *Tenterden*, in giving judgment, said that, if there had been no previous decision, he should have had some doubt; he then, however, allowed it to be a wholesome doctrine "that trustees who are empowered to make *a road* from one place to another, should be bound to make the whole of *that road*" before they call on the public to repair any part of it. That may be admitted. The whole question here is, whether, in point of fact, an entire highway has been brought into this district: if it has, the incidents of a highway follow, and, among them, the liability of the inhabitants to repair; *Rex* v. *Netherthong* (*c*). "The road leading from *Dry Clough* through *Shaw* to *New Hey*" is clearly mentioned in stat. 11 *G.* 4. & 1 *W.* 4. *c.* xcii. as a road by itself. The doctrine adverted to in *Rex* v. *Cumberworth* (*a*), that, to charge a district with repair of a highway, the inhabitants must be shewn to have adopted it, was overruled in *Rex* v. *Leake* (*d*); but it is a circumstance, which distinguishes the present case from *Rex* v. *Cumberworth* (*a*), that the road from *Dry Clough* to *New Hey* has been made almost thirty years, and the inhabitants of the adjacent

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of each of the respective roads to be amended, improved, or made by virtue of this act," "(that is to say) at no more than one gate on the whole line of road from *Werneth* to *Dry Clough*, and at no more than one gate on the whole line of road from *Dry Clough* to *Shaw*, and at no more than two gates on the whole line of road from *Shaw* to *Littleborough*, and at no more than two gates on the whole line of road from *Shaw* to *Rochdale*, and at no more than one gate on the whole line of road from *Goats* to *Grains*, and at no more than one gate on the whole line of road from *Bent Green* to *Middleton*."

(*a*) 3 *B.* & *Ad.* 108. (*b*) 3 *B.* & *Ad.* 110. (*c*) 2 *B.* & *Ald.* 179. (*d*) 5 *B.* & *Ad.* 469. See stat. 5 & 6 *W.* 4. *c.* 50. s. 23.

districts

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districts have from time to time repaired it. Perhaps it may be contended that, although the defendants have repaired, they are at liberty to shew that they have done so under a mistake, as was attempted in *Rex* v. *Hasling field* (*a*). But the mistake to be so set up must be of fact, not of law; and there is no ground here for alleging a mistake of fact. In *Rex* v. *The Justices of the West Riding* (*b*) it was held by two of the judges, on the construction of a turnpike act, that the making of branch roads was not a condition precedent to the main road becoming public; but the decision of those learned judges turned upon the use of the word "respectively" in the act, and may not, therefore, be available here.

Blackburne, contrà, contended, in the first place, that, in stat. 11 *G.* 4. & 1 *W.* 4. *c.* xcii., one entire line of road was contemplated, from *Werneth* to *Littleborough*, in support of which argument he relied upon the recitals of the several local acts, and the situation of places as shewn by the plan. The rule is that, where a special authority is delegated by statute to particular persons, to do acts by which the estates of individuals are affected, the power must be strictly pursued. That principle was acted upon in *Rex* v. *Cumberworth* (*c*), the authority of which case is not disputed. It is evident from the judgment of Lord *Tenterden* there, and from those of the other judges, that they did not ground their decision merely on *Rex* v. *Hepworth* (*d*). And the point in question was not decided in *Rex* v. *Hepworth* (*d*) only, but in other cases, not reported, before *Bayley* J. and *Hullock* B. In *Blakemore* v. *The Glamorganshire Canal*

(*a*) 2 *M.* & *S.* 558. (*b*) 5 *B.* & *Ad.* 1003.
(*c*) 3 *B.* & *Ad.* 108. (*d*) 3 *B.* & *Ad.* 110.

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Company (*a*) Lord *Eldon* says, "When I look upon these acts of parliament, I regard them all in the light of contracts made by the legislature, on behalf of every person interested in any thing to be done under them; and I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than any thing in the whole system of administration under our constitution. Such acts of parliament have now become extremely numerous; and, from their number and operation, they so much affect individuals, that I apprehend those who come for them to parliament, do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do; and that they shall do nothing else: — that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public, as with reference to the interests of individuals." He then proceeded to discuss the provisions respecting tolls, in stat. 11 *G.* 4. & 1 *W.* 4. *c.* xcii., contending that the clauses relied upon for the prosecution had not the effect of distributing the line from *Werneth* to *Littleborough* into several roads, the expressions cited being meant to mark the intervals at which toll gates should be erected; and he pointed out other clauses which spoke of the line of "road from *Werneth* to *Littleborough*."

Wightman, in reply. It has not been shewn on the other side whether, according to the argument for the defendants, the road from *Dry Clough* to *New Hey* was public or not when the last act passed. It had been

(*a*) 1 *Mylne & Keen*, 162.

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used and repaired. Were the parties who used it trespassers, and the repairs unauthorised? And, if the road continues in its present state, can the proprietors of the lands resume possession? As to the clauses with respect to tolls, which treat the whole line of roads as one, that may be done for some purposes, as with a view to mortgaging the tolls; but the argument for the Crown is supported if the particular roads in question be recognised as distinct for any single purpose.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. After stating the nature of the indictment and the proceedings at the trial, his Lordship said: "It appears that in 45 *G.* 3. (sess. 1805) an act passed, "for making and maintaining a road from *Hollinwood*, in the township of *Chadderton*, to *Featherstall*, in the township of *Hundersfield*, in the county palatine of *Lancaster*, and for making and maintaining several branches of road to communicate therewith." The principal line of road therefore is, by the title of the act, described to be from *Hollinwood* to *Featherstall*. And, moreover, in the preamble, it is recited that the said principal line with certain branches (four in number), which it is not necessary particularly to describe, would be "a great benefit and advantage to the inhabitants of the adjacent country," which is described as being, and is well known to be, "very populous and manufacturing," *Oldham* and *Todmorden*, amongst others, being specified. This act was repealed by another passed in the 7 & 8 *G.* 4. (sess. 1826-7), which somewhat varied the line at the *Hollinwood* terminus, and substituted *Littleborough* for *Featherstall* as the terminus at the other extremity. The variation, however, in this particular, is but trifling

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(as appears by the plan forming part of the case); and the direction of the line to *Littleborough* leads to the same tract of country as the original one to *Featherstall*. The second act above described was repealed by an act of 11 *G.* 4. and 1 *W.* 4. (sess. 1830), which made *Werneth* the terminus instead of *Hollinwood*, but left the rest of the line to *Littleborough* substantially the same, so far as the question before us is concerned.

It follows from this short statement that the original purpose of communication, as expressed in the first-mentioned act, is continued into the last, which is the existing act. It further appears that, at each extremity, parts of the road, which, together, amount to very near half of the whole line, have not been made. And the question is, whether this indictment against the inhabitants of *Edge Lane*, which is situated about the middle of the line, can be supported.

The state of authority upon this question supersedes, in our opinion, the necessity for much discussion. We would observe, however, that the remarks of Lord *Eldon* in the case of *Blakemore* v. *The Glamorganshire Canal Navigation* (*a*), considering his high authority and undoubted caution, have great weight. We also think that, where powers are entrusted by the legislature for an avowed and precise object, the pursuit and performance of that object should be rigidly watched. It by no means follows that the act of parliament for making the roads could have been obtained if the communication had been less, and, in consequence, the accommodation to the public, than that avowed and professed by the preamble of the original act. These observations, however, and others of a similar import,

(*a*) 1 *Mylne & Keen*, 162.

are

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are rendered superfluous, because they are expressly the foundation of a judgment of this Court, with the reasons for which we are satisfied, and by which we mean to abide. In the case of *Rex* v. *Cumberworth* (*a*), a certain part, and, compared with the present, a small part, of the projected road was incomplete; and for that reason an indictment against the inhabitants of *Cumberworth* for not repairing a portion of the line, was held not sustainable. We think that, in the present case, the like consequence should follow, and that judgment must be for the defendants.

Judgment for the defendants (*b*).

(*a*) 1 *B.* & *Ad.* 108. (*b*) See the next case.

The following case, decided in *Michaelmas* term 1836, may conveniently be added here.

The KING *against* The Inhabitants of the Lower District or Division of CUMBERWORTH and CUMBERWORTH HALF.

Tuesday, Nov. 22d.

(Case of the Branch Road.)

INDICTMENT against a district in certain parishes for not repairing a highway leading from the township of *Clayton West*, in the West Riding of *Yorkshire*, towards and unto the township of *Denby*, in the same riding, into, through and over a district called the lower division of *Cumberworth* &c., in the several parishes, &c. Plea, Not Guilty. At the trial before *Parke* B. at the *York* Spring assizes, 1835, the following facts appeared.

Where trustees under a turnpike act are empowered to make a road from *A.* to *B.*, and a branch from that road to *C.*, the public are not compellable to repair the main road, though complete in its whole extent, till the branch is finished.

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By stat. 6 *G.* 4. c. xxxviii. (local and personal, public), "for making and maintaining a turnpike road from *Wakefield*, to join the *Shepley Lane Head* turnpike road in *Denby Dale*, in the parish of *Penistone*, with certain branches, all in the West Riding of the county of *York*;" it was recited in the preamble, That "the making and maintaining a turnpike road from a certain street called *Market Street*, in the town of *Wakefield*, in the West Riding of the county of *York*, through the several townships of *Wakefield*, *Alverthorpe-cum-Thornes*, *Crigglestone*," &c., "*Cumberworth*, *Cumberworth Half*, and *Denby*, or some of them, and within the several parishes of *Wakefield*," &c., "and *Penistone*, or some of them, all within the said West Riding of the county of *York*, to and into and communicating with a certain turnpike road called the *Shepley Lane Head* turnpike road, at or near a place called *Heartcliffe*, in the said township of *Denby*, in the parish of *Penistone* aforesaid, and a certain branch or diversion from and out of the said road, commencing in the said township of *Crigglestone*, and in the parish of *Sandal Magna* aforesaid, extending from thence to the *Calder* and *Hebble* navigation, opposite to the *Navigation Inn*, within the said township of *Horbury*, and parish of *Wakefield* aforesaid; and also another branch or diversion, from and out of the said road, commencing in or near a certain close called *Pikeley*, belonging to *Thomas Richard Beaumont*, Esquire, and *Diana* his wife, lying in the said township and parish of *Emley*, in the Riding aforesaid, extending from thence in a south westwardly direction through the same townships of *Bretton* (otherwise *West Bretton*), *Clayton West* and *High Hoyland*, in the said several parishes of *Sandal Magna*, *Silkstone*, and *High Hoyland*, or some of

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of them, in the said Riding, terminating on the common highway in the said last-mentioned town of *High Hoyland*; and also another branch or diversion from and out of the said road from or from near the said close called *Pikeley*, to the highway leading from *Emley* to *Bretton* (otherwise *West Bretton*), near to a place called *Bentley Grange*, all in the said township of *Emley*; and also the erecting, making, and maintaining such bridge or bridges over the river *Calder*, and also over the cut or canal called the *Calder* and *Hebble* navigation, and other brooks and streams on the line of the said intended road and branches or diversions, as may be necessary for continuing and uniting the said road and branches or diversions, and the several parts thereof respectively; and the widening, extending, and improving such of the bridges already erected over the said navigation and brooks and streams as are in the line of the said road and branches or diversions respectively, will be a great advantage and accommodation to the inhabitants of the manufacturing towns and places in the neighbourhood, and to the public at large." Certain persons named were then appointed "trustees for making and maintaining the said roads and bridges; and for otherwise putting this act in execution;" and it was enacted, that "the said roads and bridges shall be called the *Wakefield* and *Denby Dale* turnpike road." Various powers and directions were given for carrying the act into exetion (*a*). The main line, from *Wakefield* to the *Shepley Lane Head* turnpike road, was the same which was in question in the former case of *Rex* v. *Cumberworth* (*b*).

(*a*) Some of the clauses will be found shortly noticed in the argument, and need not be further stated.

(*b*) 3 *B.* & *Ad.* 108.

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After the preferring of the indictment in that case, the whole of the above mentioned line was made and put into good repair, and was used by the public; but the branch from *Pikeley Close* to the highway in *High Hoyland* remained unmade. This branch was to have diverged, at an acute angle, from the main line above-mentioned, between *Wakefield* and the *Shepley Lane Head* road. It lay entirely out of the way from either of those termini to the other. It would have been the proper way for a person going from *Wakefield* to *High Hoyland*, but not for one going to *High Hoyland* from the *Shepley Lane Head* road. A witness stated that the branch, if made, would be used by few persons; chiefly by *Hoyland* people, who would travel it in going from *Hoyland* to *Wakefield*. The portion of road complained of lay on the main line. That line had been repaired by all the districts through which it passed, except the district indicted.

On the trial, *Rex* v. *Hepworth* (*a*) and *Rex* v. *Cumberworth* (*b*) were cited for the defendants; and it was contended that the doctrine, there laid down as to a road of which the main line was incomplete, applied equally to the case in which a road was to be made with branches, and one of these was unfinished. *Rex* v. *Mellor* (*c*) and a case not named (probably *Rex* v. *The Paddington Vestry* (*d*)), were also referred to. The learned judge, in summing up, stated that he was not disposed to go the length of saying that all the roads contemplated by the act ought to have been made before the principal road in question could be repairable by the public; and he observed that the act

(*a*) 3 *B.* & *Ad.* 110.
(*b*) 3 *B.* & *Ad.* 108.
(*c*) 1 *B.* & *Ad.* 32.
(*d*) 9 *B.* & *C.* 456.

required

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required bridges to be made, and other works executed in various places, and that it would be unreasonable to say that the road in question should be no road till every one of these was performed: but he said that, in order to charge the defendants, the principal road ought to have been fairly made by the trustees, and complete at some one time, from one end to another: and he put it to the jury whether or not they were satisfied that this had been done. The jury found that the road had been sufficiently made in the first instance; and a verdict of Guilty was taken, but leave reserved to move to enter a verdict of acquittal. A rule nisi was obtained accordingly in the following term.

Creswell and *J. L. Adolphus* now shewed cause. It is not necessary here to contest the doctrine of the former case of *Rex v. Cumberworth* (*a*), though it may be observed that in that case the judgment proceeded, in some degree, on the now exploded doctrine of adoption. And upon that decision a difficult question arises, whether, if the road has been long used by the public with the owner's acquiescence, the public can be excluded from it, and held liable as trespassers if they attempt to use it for the future, merely because the trustees have not done all upon the line of road which they ought to have done. Lord *Tenterden*, in *Rex v. Cumberworth* (*a*), relied much on the ruling of *Hullock* B. in *Rex* v. *Hepworth* (*b*); but the learned judge there meant only to lay it down that, if the proceedings which had been taken were relied upon, under the circumstances of that case, as a dedication to the

(*a*) 3 *B. & Ad.* 108. (*b*) 3 *B. & Ad.* 110.

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public, the local act was an answer. The decision in *Rex* v. *Edge Lane* (*a*) was expressly grounded on that in *Rex* v. *Cumberworth* (*b*), and carries the law no farther; since the Court, in *Rex* v. *Edge Lane* (*a*), considered the unfinished portion of road, not as a branch, but as part of the line which included the piece of road indicted. In *Rex* v. *The Justices of the West Riding* (*c*), *Littledale* and *Taunton* Js., who thought that the road might be certified as complete before the branches were made, relied upon the word "respectively" in the local act; but that word would not have been sufficient ground for such an opinion if the learned Judges had not considered that, where there is a main line of road with branches, the branches may be treated as distinct and subsidiary. Here, the main line is described in the preamble of the act, by its course and termini, as a road by itself; then the branch in question is described in the same manner, as a complete road, "commencing in or near a certain close called *Pikeley*," extending from thence &c. through &c., "terminating on the common highway in the said last-mentioned town of *High Hoyland*;" and the other branches are marked out in the same manner. And, in fact, as to the particular branch in question, a person travelling the indicted road from *Wakefield* to the *Shepley Lane Head* road can have nothing to do with the branch, which lies wholly out of his way, diverging from his road, and terminating at a place which lies at a distance on one side of it. Then the question is, one complete and independent road having been made by the trustees, whether the public is exempt from repairing such road,

(*a*) Antè, p. 723. (*b*) 3 *B.* & *Ad.* 108.
(*c*) 5 *B.* & *Ad.* 1003.

because

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because another complete and independent road continues unmade. [*Coleridge* J. Do you say that, if a branch were made, but not the main line, that branch would be repairable by the public?] It is not necessary to argue that; probably the branches would not be accessible, or would be of little use to the public, without the main line, though the main line is not so dependent on the branches. It is true that the act, in sect. 1., says that the roads and bridges there mentioned shall be called, "The *Wakefield* and *Denby Dale* turnpike road;" but that describes only the subject-matter of the trust; the several highways, as such, cannot be included under the general name, for by what termini could the main line and branches be described as one road? And the "roads" are referred to in many parts of the act, as distinct things. It will be contended that the trustees are under an implied engagement to complete the branch road before any repair of the main line can be enforced. But the condition precedent, in truth, is only that the trustees shall have completed that road upon which they demand that the repairs shall be done. An implied undertaking must be the reasonable result of the circumstances in which the parties are placed relatively to each other; as in some of the instances given in 1 *Vin. Abr. Actions of Assumpsit* (M). Here, the trustees obtain power to burden the public with a road. There is an implied undertaking that they shall first make that road, not some other road, or a bridge, in respect of which the act of the trustees does not burden them. The duty to be required of the trustees is correlative to the obligation they seek to impose on the public: nor is there anything indefinite in either, because the trustees acknowledge them-

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themselves bound to make a certain road marked out in the act of parliament by termini as the complete main line, or branch, before they require such main line or branch to be repaired. And this view of the obligation is consistent with all that is said by the Court in the former case of *Rex* v. *Cumberworth* (*a*). The preamble of the act states that the making of a turnpike road, and of certain branches, will be an advantage to the towns and places in the neighbourhood, and to the public at large: but that must be taken distributively, and not as implying that every neighbourhood and portion of the public has an interest in every part of the work, and a right to insist on its being completed. Very serious inconvenience would arise if, under an act like this, requiring works of great extent and variety to be done, neither repairs could be enforced, nor tolls collected, as long as it could be alleged that a culvert was not made, or a bridge not properly widened, at whatever distance from the place where the dispute arose. There is, in fact, scarcely any district subject to a turnpike act, in which roads are not opened to the public before every thing required by the act has been done. The dictum of Lord *Eldon* in *Blakemore* v. *The Glamorganshire Canal Company* (*b*), cited in *Rex* v. *Edge Lane* (*c*), referred to a canal act, and is not properly applicable to a turnpike act. A canal is a private speculation; and an act establishing it may be strictly a bargain between adventurers and the public: but (as is explained by the judgment of this Court in *Bussey* v. *Storey* (*d*)), the object of a turnpike act is to furnish the public with an additional mode of discharging an

(*a*) 3 *B.* & *Ad.* 108.
(*b*) 1 *Mylne* & *Keen*, 162.
(*c*) Antè, p. 727, 728.
(*d*) 4 *B.* & *Ad.* 109.

obligation,

obligation, which the public itself must by some means provide for in all places, namely, that of maintaining highways.

J. B. Greenwood, contrà. It is a general rule, to construe acts of this kind rigidly, as contracts made with the public by the parties obtaining them. Such a rule of construction was lately acted upon in the case *In re the London and Greenwich Railway Company* (*a*). The words of Lord *Eldon*, which have been referred to, are applicable here. (He then read the passage (*b*).) By sections 7 and 8 of the present act, the trustees are empowered to erect toll-gates where they shall judge necessary on the "said roads," and to take tolls at such gates; and by sect. 13 the trustees are forbidden to take more than three full tolls in respect of the same horse, &c., for passing or repassing, at any time or times in any one day, through all or any of the toll-gates "along the whole line of the said roads." The trustees may now place their gates so as to take the full tolls; but a person paying three full tolls could not pass along the whole line of the roads contemplated by this clause, the part now in question remaining unfinished. The act, sect. 22, recites that "the line of the said new road might be made more conveniently," if two diversions were made, which are then described; and the trustees are empowered, "in case they shall think proper," to make such diversions. No such discretion is allowed as to the branches. The argument, that several parts of the set of roads comprised in the act are, for some purposes, described as distinct roads,

(*a*) 2 *A. & E.* 678. (*b*) Antè, p. 727, 728.

was

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was used, but without success, in *Rex* v. *Edge Lane* (*a*). In *Rex* v. *The Justices of the West Riding* (*b*) the word "respectively" was insisted upon by those who contended that the main road might be certified before the branch roads were finished. There is no equivalent expression in the present act. If the wording of this act had been similar to that of the act in question there, it might, perhaps, have been contended, in the present case, that the preamble should be taken distributively; but here the whole set of roads is comprised under the one denomination of "The *Wakefield* and *Denby Dale* turnpike road." It may be assumed in this case that many parties may have consented to the act being passed, on the faith that the branch roads, as well as the main line, would be completed. A like consideration weighed with the Court in *Rex* v. *Edge Lane* (*a*). (He then read the passage in the judgment of the Court in that case, beginning, "We also think that, where powers," and ending, "original act;" antè, page 730.)

Lord DENMAN C. J. I think that it is necessary to adhere to the decisions in *Rex* v. *Cumberworth* (*c*) and *Rex* v. *Edge Lane* (*a*). Distinctions may be drawn, and striking ones, for the purpose of shewing that lines of road, under circumstances like the present, may form separate public roads. But great inconvenience must arise if it be held that, in such cases, each portion of road can be made a subject of distinct consideration. It is safer to say that the trustees have their powers given to them in respect of the whole undertaking mentioned in the act, and that that must be

(*a*) Antè, p. 723.
(*b*) 5 *B.* & *Ad.* 1003.
(*c*) 3 *B.* & *Ad.* 108.

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completed. It is said here that the whole of the main line was completed; but in *Rex* v. *Cumberworth* (*a*) there was a line of road made between certain roads; that is, from *Market Street, Wakefield*, to a point where the new road intersected another public highway; and that was held not sufficient. Here, one line of road is completed; but the branches may be more important than the main line, and may have been the inducement to the public to agree in the act being passed. I think that, if any part of the work contemplated is undone, we must consider the whole undone.

PATTESON J. I also think that we must adhere to *Rex* v. *Cumberworth* (*a*). I am afraid of introducing such distinctions as have been suggested. In all these acts there is a bargain with the public; and, under such an act as the present, unless the trustees make all the roads, they do not complete their bargain. To hold otherwise would lead to a great deal of litigation and many inconvenient distinctions.

WILLIAMS J. The completion of the line of roads, and of all its parts, must be considered a condition precedent to the charge of repairs being thrown upon the public. We cannot say upon what terms parties may have been induced not to oppose the introduction of this act. Though a benefit might result from the main line, yet the inducement to acquiescence may have been the additional advantage to be derived from the branches.

COLERIDGE J. I am of the same opinion. The principle on which this case was argued for the prosecution

(*a*) 3 *B.* & *Ad.* 108.

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was taking at first sight; but, when I ask whence the trustees can derive the right to burden this district, or to appropriate any person's land, except from complying with all the terms of the act, I cannot find that the principle will carry me on. To determine such a question we must resort to the broad ground, that acts like this are bargains made on behalf of the public, not on the great line of road merely, but on every part of the roads. It is contended that the trustees have done enough to warrant them in imposing this burden in respect of the main road: but the branches may have been the very consideration upon which consent was given to the making of the main road. The original road for which that was substituted may have been very good, but the neighbouring districts may have forborne to oppose the making of a new one, on the faith that these branches would be added; and great hardship might be inflicted if trustees could stop, after having performed a part of the works contemplated, and say that enough had been done. We must consider the bargain comprised in this act of parliament as an entire thing: the trustees must do all that it requires them to do, before they can throw the burden of repair on any part of the public.

Rule absolute.

REGULA GENERALIS.

Hilary Term 6 *W.* 4.

23rd *January*, 1836.

WHEREAS, by the act of the 3d & 4th of *W.* 4. *c.* 42. *s.* 43., it is enacted that none of the several days mentioned in the statute passed in the sessions of parliament holden in the 5th and 6th years of the reign of King *Edward* the Sixth, intituled "An Act for keeping Holidays and Fasting Days" shall be observed or kept in the Courts of common law, or in the several offices belonging thereto, except Sundays, the day of the Nativity of our Lord, and the three following days, and *Monday* and *Tuesday* in *Easter* week; IT IS HEREBY ORDERED, that henceforth, in addition to the said days, the following, and none other, shall be observed or kept as holidays in the several offices belonging to the said Courts, viz.: *Good Friday* and *Easter Eve*, and such of the five days following as may not fall in the time of Term, but not otherwise; the birth-day of our lord the King; the birth-day of our lady the Queen; the day of the Accession of our lord the King; *Whit Monday* and *Whit Tuesday*.

DENMAN.	W. BOLLAND.
N. C. TINDAL.	J. B. BOSANQUET.
ABINGER.	E. H. ALDERSON.
J. A. PARK.	J. PATTESON.
J. LITTLEDALE.	J. GURNEY.
S. GASELEE.	J. WILLIAMS.
J. PARKE.	J. T. COLERIDGE.

1832.

REGULA GENERALIS.

Hilary Term, 6th *W.* 4.

(*Read in Court, February* 1st, 1836.)

WHEREAS by the statute 4 *H.* 4. *c.* 18. it was enacted, "That all the attornies shall be examined by the Justices, and by their discretions their names put on the roll, and they that be good and virtuous, and of good fame, shall be received, and sworn well and truly to serve in their offices;" AND WHEREAS by the statute 3 *Jac.* 1. *c.* 7. *s.* 2. it was enacted, "That none shall from henceforth be admitted attornies in any of the King's Courts of Record, but such as have been brought up in the same courts, or otherwise well practised in soliciting of causes, and have been found by their dealings to be skilful and of honest disposition; and that none be suffered to solicit any cause or causes in any of the courts aforesaid, but only such as are known to be men of sufficient and honest disposition;" AND WHEREAS by a rule made in *Michaelmas* term, 1654, in the Courts of K. B. and C. P. it was ordered that the Courts "should once in every year, in *Michaelmas* term, nominate twelve or more able and credible practisers to continue for the ensuing year to examine such persons as should desire to be admitted attornies, and appoint convenient times and places for the examination; and the persons desiring to be admitted were first to attend with their proofs of service, then repair to the persons appointed to examine, and, being approved, to be presented to the Court and sworn;" AND

WHEREAS

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WHEREAS by the statute 2 *G.* 2. *c.* 23. *s.* 2. it was enacted, "That the Judges, or any one or more of them, should and they were thereby authorised and required, before they should admit such person to take the oath, to examine and inquire by such ways and means as they should think proper, touching his fitness and capacity to act as an attorney: and if such Judge, or Judges respectively, should be thereby satisfied that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, the said Judge, or Judges, of the said courts respectively should, and they were thereby authorised to administer to such persons the oath thereinafter directed to be taken by attornies; and, after such oath taken, to cause him to be admitted an attorney of such court respectively." AND WHEREAS, in order to carry the last-mentioned statute more fully into effect, it is expedient annually to appoint examiners, subject to the controul of the Judges in manner hereinafter mentioned.

1. IT IS ORDERED, That the several Masters and Prothonotaries for the time being of the Courts of King's Bench, Common Pleas, or Exchequer, respectively, together with twelve attornies, or solicitors, be appointed by a rule of court, in *Easter* term in every year, to be examiners for one year; any five of whom (one whereof to be one of the said Masters or Prothonotaries) shall be competent to conduct the examination; and that from and after the last day of next *Easter* term, subject to such appeal as hereafter mentioned, no person shall be admitted to be sworn an attorney of any of the courts, except on production of a certificate, signed by the major part of such examiners, actually present at and conducting his examination, testifying his fitness and capacity

1836. pacity to act as an attorney — such certificate to be in force only to the end of the term next following the date thereof, unless such time shall be specially extended by the order of a Judge.

2. IT IS FURTHER ORDERED, That the examiners so to be appointed shall conduct the said examinations, under regulations to be first submitted to and approved by the Judges.

3. AND IT IS FURTHER ORDERED, That, in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for admission by petition in writing to the Judges, to be delivered to the clerk of the Lord Chief Justice of the Court of King's Bench, upon which no fee or gratuity shall be received; which application shall be heard in *Serjeant's Inn Hall*, by not less than three of the Judges.

4. AND WHEREAS the hall or building of the Incorporated Law Society of the United Kingdom in *Chancery Lane* will be a fit and convenient place for holding the said examination, and the said society have consented to allow the same to be used for that purpose; IT IS FURTHER ORDERED, That, until further order, such examinations be there held on such days being within the last ten days of every term, as the said examiners, or any five of them, shall appoint: and that any person not previously admitted an attorney of any of the three Courts, and desirous of being admitted, shall, in addition to the notices already required, give a term's notice to the said examiners of his intention to apply for examination, by leaving the same with the secretary of the said society at their said hall, which notice shall also state his place or places of residence,

or

or service, for the last preceding twelve months, and in case of application to be admitted, on a refusal of the certificate, shall give ten days' notice, to be served in like manner, of the day appointed for hearing the same. 1836.

5. AND IT IS FURTHER ORDERED, That three days at the least before the commencement of the term next preceding that in which any person, not before admitted, shall propose to be admitted an attorney of either of the Courts, he shall cause to be delivered at the Master's or Prothonotary's office, as the case may be, instead of affixing the same on the walls of the Courts, as now required, the usual written notices, which shall state in addition to the particulars now required, his place or places of abode, or service, for the last preceding twelve months; and the Master or Prothonotary, as the case may be, shall reduce all such notices as in this rule first mentioned into an alphabetical table or tables under convenient heads, and affix the same, on the first day of term, in some conspicuous place within or near to, and on the outside of each Court.

6. AND WHEREAS it is expedient that, upon the readmission of attornies, the Judges should have further means of inquiring as to the circumstances under which persons applying to be readmitted discontinued to practice, and as to their conduct and employment during the time of such discontinuance, IT IS FURTHER ORDERED, That at the time of giving the usual notice of the intention to apply for such readmission, the party shall cause to be filed the affidavit on which he seeks to be readmitted with the Master or Prothonotary, as the case may be; which affidavit shall contain, in addition to the particulars now required, a statement of his place or places of abode

1836. abode during the last preceding year; and such person shall also, at the same time, cause to be left a copy of such affidavit with the clerk of the Lord Chief Justice of the Court of King's Bench; and the rule for the readmission of such person shall be drawn up on reading such affidavit, and also an affidavit of such copy having been left in compliance with this rule.

DENMAN.	W. BOLLAND.
N. C. TINDAL.	J. B. BOSANQUET.
ABINGER.	E. H. ALDERSON.
J. A. PARK.	J. PATTESON.
J. LITTLEDALE.	J. GURNEY.
S. GASELEE.	J. WILLIAMS.
J. PARKE.	J. T. COLERIDGE.

END OF HILARY TERM.

HILARY VACATION.

IN THE EXCHEQUER CHAMBER.

(Error from the King's Bench.)

GEORGE JAMES and Another *against* PLANT.

TRESPASS for breaking and entering certain closes.

Plea, that the closes in which &c. were parcel of a certain farm, lands, and premises called *Woodseaves House Farm*, mentioned in the after stated indenture, and that, before the making of that indenture, *Thomas Smallwood* and *Maria* his wife (in right of *Maria*), and *Elizabeth Hector*, were seised respectively in fee each of an undivided moiety of and in *Woodseaves House Farm*, and also of and in the messuages, tenements, and premises after mentioned to have been bargained, sold, and released to *Thomas James*, and called respectively *Park Hall* and *Park House*: and, being so seised, afterwards, viz. *November* 10th, 1812, by indenture of release between *Smallwood* and his wife of the first part, *Elizabeth Hector* of the second, *Thomas Huxley* of the third, and *Richard Spearman* of the fourth, of the date last mentioned, for the making a partition of the messuages, or appertaining, or *therewith usually held, used, occupied, or enjoyed*: to have and to hold the messuages, &c., called *A.*, with the buildings, lands, &c. thereunto belonging, *and their appurtenances*, to the releasee to the use of *S.* in fee; habendum, as to estate *B.*, in similar terms with respect to the parcels, to the releasee to his own use in fee, in order that he might become tenant to the præcipe in a recovery.

Estates, *A.* and *B.*, formerly distinct, became vested in coparceners. Before that time, a right of way had been enjoyed from *A.* over *B.*, and, after the unity of seisin, the way always continued to be used. The parceners, for the purpose of making partition, conveyed to a releasee to uses the messuages, tenements, lands, &c. (of which the estates consisted), and all houses, outhouses, ways, easements, &c., to the said several messuages or tenements, lands, &c., belonging

Held, that the deed sufficiently shewed an intention that a right of way, (which way was admitted to have been used up to the time of the deed,) from the high road over *B.* to *A.* and back, for the convenient use of *A.*, by the occupiers of *A.*, should pass to the uses limited as to *A.*

That by the word "appurtenances," in the habendum as to *A.*, interpreting that clause with reference to the other parts of the deed, the way in question did pass.

And that the releasee to uses, having no estate in *A.*, had not such a seisin of the soil as would extinguish the right of way by unity of seisin.

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lands, &c. after described, and for barring all estates tail, reversions, &c., of and in the messuage or tenement after described, called *Woodseaves Farm*, and the lands and hereditaments thereunto belonging, and the allotment, &c., also after described, and for conveying and assuring all the said messuages, lands, &c., to the uses and on the trusts after declared, and in consideration of 10*s.*, the said *T. S.*, and *Maria* his wife, and *Elizabeth Hector*, did, according to their respective estates, grant, bargain, sell, alien, and release to *Huxley* (in his possession then being by a bargain and sale, &c.) all that messuage or tenement called by the name of *Park Hall*, with the outbuildings and several parcels of land thereunto belonging and then occupied therewith, situate, &c., containing &c.; and also all that other messuage or tenement called by the name of *Park House*, with the buildings and several parcels of land thereunto belonging and then occupied therewith, situate, &c., containing &c.; which two last-mentioned messuages or tenements, lands, &c., were purchased by *Brooke Hector* of and from *Richard Whitworth*, Esq., and, on the decease of the said *B. H.* intestate, descended to the said *Maria* and *Elizabeth* his two daughters and co-heiresses; and also all that other messuage or tenement called by the name of *Woodseaves House Farm*, with the outbuildings and the several parcels of land thereunto belonging, and then occupied therewith, situate, &c., containing &c.; which last-mentioned messuage and premises were purchased from certain persons (in the plea mentioned) by *Thomas Adams*, and were, by settlement made on the marriage of the said *Brooke Hector* with *Elizabeth* his late wife, daughter of the said *Thomas Adams*, limited, after her decease, and in default of her male

male issue by *B. H.*, to the use of all her daughters by *B. H.* in tail general; and also all that allotment, &c. (an allotment of waste under an inclosure act): "And all houses, outhouses, edifices, buildings, barns, stables, cowhouses, yards, gardens, orchards, ways, paths, passages, waters, watercourses, hedges, ditches, mounds, fences, trees, woods, underwoods, and the ground and soil thereof, easements, profits, privileges, advantages, emoluments, hereditaments, rights, members, and appurtenances whatsoever, to the said several messuages or tenements, lands and hereditaments hereinbefore described belonging or in anywise appertaining, or therewith usually held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof;" and the reversion and reversions, remainder and remainders, &c., and all the estate, right, title, &c. of *Thomas Smallwood* and *Maria* his wife, and *Elizabeth Hector*, and each of them, of, in, to, or out of the said premises, &c.: "to have and to hold the said messuages or tenements called *Park Hall* and *Park House*, with the buildings, lands, and hereditaments thereunto belonging, thereby before granted and released, and expressed and intended so to be, and every part and parcel thereof, with their and every of their appurtenances," to *Huxley* and his heirs, to the uses and on the trusts after declared: "and to have and to hold the said messuage or tenement called *Woodseaves House Farm*, with the buildings, lands, and hereditaments thereunto belonging, and the said allotment," &c. before respectively granted, "and every part and parcel thereof, with their and every of their appurtenances," to *Huxley*, his heirs, and assigns, to the use of *Huxley*, his heirs, and assigns, to the intent that he

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might become tenant to the præcipe in a recovery to be suffered as was after mentioned.

The plea then stated a covenant in the said indenture by *Smallwood*, on behalf of himself and his wife, to levy a fine of their moiety in *Park Hall* and *Park House*, with the premises thereto belonging, and before mentioned to have been purchased by *Brooke Hector*, to *Spearman* and his heirs: and that it was agreed between the parties to the indenture, that a recovery should be suffered of *Woodseaves House Farm*, with the buildings, &c., and appurtenances thereto belonging, and also of the said allotment with the appurtenances, in which recovery *Spearman* should recover against *Huxley*, and *Thomas* and *Maria Smallwood* and *Elizabeth Hector* should be vouchees: and that the uses of the fine of the said messuages, &c., and premises, before granted, and the uses of the said recovery were declared respectively to be, as to "the whole of the said messuages or tenements called *Park Hall* and *Park House*, with the buildings, lands, hereditaments, and appurtenances thereunto respectively belonging," and also the said allotment with its appurtenances, to such use, &c., and for such estate and interest as *Smallwood* should by deed appoint &c.; and, in default of such appointment, &c., to the use of *Smallwood* and his assigns during his life; and, from and after the determination of that estate in *Smallwood*'s lifetime, to the use of *Spearman*, his heirs and assigns, during *Smallwood*'s life, in trust for *Smallwood* and his assigns; and, from and after the determination of that estate, to the use of *Smallwood*, his heirs and assigns: and, as to "the said messuage or tenement called *Woodseaves House Farm*, with the buildings, lands, hereditaments, and appurtenances thereto belonging," to

the

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the use of *Elizabeth Hector*, her heirs and assigns for ever.

The plea then stated a recovery suffered of *Woodseaves* and the allotment, and a fine levied of a moiety of *Park Hall* and *Park House*, according to the above indenture.

The plea went on to state, "that, long before and at the time of the making of the said indenture of release, and of the levying of the said fine and suffering the said recovery, the occupiers for the time being of the said messuage and premises called *Park Hall* had always been used to have and enjoy a certain way from a certain public King's highway in the parish of" &c., "into, through, over, and along the said closes in which &c., towards and unto *Park Hall* aforesaid, and so back again into, through, over, and along the said closes in which &c., unto and into the said public King's highway, for themselves and their servants, on foot, and with cattle and carts and other carriages, to go, return, pass and repass in and along the said way, every year and at all times," &c. "for the convenient use and occupation of *Park Hall* aforesaid; and the said way had, before and at the time of the making of the said indenture of release, and of the levying of the said fine and suffering the said recovery, been always held, used, occupied, and enjoyed therewith."

The plea then stated that, after the fine and recovery, by indenture, to which *Smallwood*, *Spearman*, and others were parties, *Spearman* and others bargained, sold, and released to *Thomas James*, in fee, the said tenements and premises, with the appurtenances, called *Park Hall*, and all houses, outhouses, easements, &c. thereto belonging or therewith held, used, occupied, or enjoyed. And that

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Thomas James died seised in fee: whereupon his estate in the tenements and premises descended to *William James*, his heir at law, from whom the present defendant *George James* deduced title. And the defendant *James* pleaded that he, as the owner and occupier of *Park Hall* aforesaid, before and at the said several times when &c., was and still is entitled to such way as last aforesaid; and he, in virtue of such his alleged title, and the other defendant as his servant, justified the trespasses complained of.

The plaintiff demurred to this plea, assigning for cause, "that it does not appear that the said supposed way in the said plea mentioned was in any manner granted or reserved to the said defendant *George James* or any person under, by, or from whom he claims, or that he hath any claim or title to the same." The defendants joined in demurrer; and on argument, in *Michaelmas* term 1833, the Court of King's Bench gave judgment for the plaintiff (*a*).

Error was brought on the judgment; and the case was argued after *Trinity* term 1835 (*b*).

Sir *W. W. Follett* for the plaintiff in error. It appears by the pleadings that the occupiers of *Park Hall* had an ancient right of way over the *Woodseaves* estate to the high road; that that right was lost by unity of seisin, but that the actual user of the way continued down to the time when the indenture of *November* 1812 was executed. The object of the agreement of partition was, that one daughter of *Brooke Hector* should take

(*a*) *Plant* v. *James*, 5 *B.* & *Ad.* 791.

(*b*) *June* 18th. Before *Tindal* C. J., Lord *Abinger* C. B., *Park*, *Bosanquet*, and *Vaughan* Js., and *Alderson* B.

the

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the *Park Hall* estate, the other the *Woodseaves*, each estate as it was then used. The question is whether, as to *Park Hall* and the way from it over *Woodseaves*, an execution of that intent can be collected from the deed. The whole property, including both *Park Hall* and *Woodseaves*, is conveyed to *Huxley*, with all "easements, profits, privileges, advantages, emoluments, hereditaments, rights, members, and appurtenances whatsoever, to the said several messuages or tenements, lands and hereditaments" before described, "belonging or in anywise appertaining, or therewith usually held, used, occupied, or enjoyed." If *Park Hall* by itself had been so conveyed, there is no doubt that the way now claimed would have passed. Where a right of way has existed, from one man's estate over the estate of another, and the two properties have centered in the same person, and he again conveys away that estate to which the easement has belonged, the general rule is that, if he merely grants such estate "with the appurtenances," the right of way is not revived; but, if he grants it with all easements &c. "therewith used and enjoyed," that operates as a revival. But other words, if clearly intended to have such an effect, may operate in the same manner. In *Bro. Abr. Extinguishment et Suspencion*, pl. 15., it is said that, if a way be extinct by unity of possession of the land from which &c., and the mill to which &c., and the whole descend to coparceners, and, upon partition, one of them has the land, and the other the mill and the way reserved to it, the way is revived, tamen videtur, that it is a new way (*a*). In *Whalley* v. *Tompson* (*b*) a way had been enjoyed from

(*a*) See 11 *Vin. Abr. Extinguishment*, (C) pl. 9. (*b*) 1 *B. & P.* 371.

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close *A.* over close *B.*, the same person being seised of both. He devised his estate in close *A.* "with the appurtenances;" and it was held that the right of way did not thereby pass, for that the word "appurtenances" in the will had nothing to operate upon. The words of the will there did not testify the intention to pass the right of way. But, "if a man seised of *Blackacre* and *Whiteacre*, uses a way through *Whiteacre* to *Blackacre*, afterwards grants *Blackacre*, with all ways, &c. this way thro' *Whiteacre* shall pass to the grantee;" *Com. Dig. Chimin* (D. 3.). In *Clements* v. *Lambert* (*a*), where common appurtenant to a messuage had been extinguished by unity of possession, the party seised conveyed the messuage with all commons and appurtenances thereto belonging or in anywise appertaining; and this was held not to convey a new right of common; but it seems admitted there that, if the deed had contained such words as "used with the said messuage," the common, if shewn to have been in fact so used, would have passed. *Morris* v. *Edgington* (*b*), unless denied to be law, is decisive in favour of the plaintiff in error. There a man demised part of his premises, with certain rights of ingress, &c., and "all other ways and easements to the said demised premises belonging and appertaining;" and these latter words were held to pass a right of way on the grantor's own premises, which the grantor had himself used for access to the premises demised, *Mansfield* C. J. relying upon the intent of the grantor as shewn by the circumstances of the case. The principle, that in such a case the intent must be consulted, was recognised in *Barlow* v. *Rhodes* (*c*).

(*a*) 1 *Taunt.* 205. (*b*) 3 *Taunt.* 24.
(*c*) 1 *Cro. & M.* 439. *S. C.* 3 *Tyrwh.* 280.

Now,

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Now, in the present case, after the grant of all ways and easements to the several messuages, &c., appertaining or therewith usually held, the habendum follows, to have, &c., "the said messuages or tenements called *Park Hall* and *Park House*, with the buildings, lands, and hereditaments thereunto belonging, thereby before granted and released," &c., "and every part and parcel thereof, with their and every of their appurtenances." It is clearly intended here, by the word "appurtenances," to convey the right of way in question to the uses pointed out as to *Park Hall* and *Park House*. It would otherwise be unmeaning to convey to *Husley* by the previous clause the "ways" to the several messuages, &c., appertaining. He could not take them. Whatever vested in him by that clause was to pass immediately to the cestui que use, not to be held by him for a moment. The intention was, that *Park Hall*, and all that belonged to it, should pass to one family, and *Woodseaves* to the other; and that intention must prevail, though the words employed in the habendum itself are not strictly proper for the grant of a revived right of way.

R. V. Richards, contrà. No intendment can be made against a grantor, or in favour of a grantee, in this case, because both the parties interested are in the situation of grantors. The object of the deed was to make the two estates entirely separate; and there is no ground for supposing an intention to revive an incumbrance or easement for the benefit of *Park Hall*, at the expense of *Woodseaves*. The words of conveyance to *Husley*, "and all ways, easements," &c., are only general and usual words of conveyance; they could not carry to the

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the releasee a right of way, properly so called, over his own land: and, in the subsequent clauses, by which the estate is divided, no such words are used, nor is any intention shewn but that of passing whatever strictly belonged to each farm. If the previous clause did not carry a right of way to *Huxley*, there is nothing in the subsequent clauses to which a different operation can be ascribed. An entire partition was contemplated. [*Tindal* C. J. The partition would be complete, though the proprietor of one estate retained an easement over the other. Lord *Abinger* C. B. There had been an immemorial way from *Park Hall* over *Woodseaves*: the intention may have been only to make the two estates separate, as they were before.] The way does not appear to have been a way of necessity, or material to the use and enjoyment of the *Park Hall* estate: and, after the unity of possession, it was as if it had never existed. In *Morris* v. *Edgington* (*a*) it was clear that some way was intended to pass; and the question was, what passed. The observations of *Bayley* B., in *Barlow* v. *Rhodes* (*b*), referred to by the Court of King's Bench when giving judgment in *Plant* v. *James* (*c*), apply to this part of the subject. [*Alderson* B. If the general words of conveyance to the releasee to uses had been repeated in the clause limiting the uses as to *Park Hall* and *Park House*, would not the way in question have passed?] In that case it would. [*Alderson* B. Is not the same thing done, more compendiously, by the present mode of conveyance? Lord *Abinger* C. B. Suppose no recovery had been necessary, and the coparceners had simply conveyed

(*a*) 3 *Taunt.* 24. (*b*) 1 *Cro. & M.* 449. 3 *Tyrwh.* 287.
(*c*) 5 *B. & Ad.* 794.

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Park Hall and *Woodseaves*, with the ways, &c., thereto belonging, to a trustee who was to re-convey to two parties; and he had re-conveyed the respective estates with the appurtenances, to those parties, not specifying the ways. Must not the former deed have been looked at, to see what he meant to convey? The whole would have been considered as one conveyance. *Alderson* B. Why should any way have been conveyed to the releasee to uses, unless it was intended to go to some one through him?] All the estate goes to him, and the ways are included: but there is no reason that the way insisted upon should pass to either cestui que use. The party claiming is bound to shew that the deed is clear in his favour. The words relative to a right of way are used in that part of the deed where they cannot have the operation now contended for, and omitted in the clause which points out what the cestui que use of *Park Hall* and *Park House* is to have.

Sir *W. W. Follett*, in reply. The word "appurtenances," in the clause limiting the uses as to *Park Hall*, refers back, and embodies the several matters (ways, easements, &c.) enumerated in the previous clause. There could have been no doubt as to the effect of the word, if *Park Hall* alone had been conveyed in the form here used; and it can make no difference in the construction, that *Park Hall* and *Woodseaves* are both conveyed by the same deed. And it is a material circumstance that, in the earlier clause, the conveyance is of the ways, easements, &c., "to the said *several* messuages," &c., belonging. This is not noticed in the judgment of the Court of King's Bench. It is said in that judgment (p. 796.) that the right of way

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way could not pass, because, "the soil itself of both estates passed;" and the words "all ways used, occupied, and enjoyed with the lands," could not "create a right of way de novo in the very lands the freehold of which was granted by the same sentence in the deed." That would be true, if the freehold of the two estates had vested in the releasee; but that was not so: at the moment when the deed was executed, the two estates passed each to the person to whose use it was conveyed; the cestui que use of *Park Hall* had the same estate, and at the same time, as if there had been no release to an intermediate party. Rights of way are conveyed by this deed, for some purpose; they cannot remain in the releasee; and, unless upon the construction suggested for the plaintiff in error, it does not appear what becomes of them.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the Court.

This case comes before us upon a writ of error, brought on a judgment of the Court of King's Bench, given for the plaintiff below, upon a demurrer to the defendants' plea, that Court having in effect determined, by their judgment, that the right of way, under which the defendants below have justified the trespasses complained of, did not pass under the indenture of release, the fine, and the recovery, set out in the defendants' plea.

There will be no necessity for us to enter into the discussion of the principles of law, upon which the judgment of the Court below has proceeded; with respect to which principles there is no difference in opinion between

between this Court and the Court of King's Bench. We all agree that, where there is a unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and that, after such extinguishment, or during such suspension of the right, the way cannot pass as an *appurtenant* under the ordinary legal sense of that word. We agree also in the principle laid down by the Court of King's Bench, that, in the case of an unity of seisin, in order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one "used and enjoyed with the land" which forms the subject matter of the conveyance.

But, agreeing thus far with the Court below, we feel ourselves compelled to differ from it in the application of these principles to the present case. For we think the intention of the grantors to pass the way in question to the owner of the *Park Hall* estate appears from the deed itself, and that there are words contained in that deed sufficient to carry such intention of the parties into effect.

It appears from the recitals in the deed that, at the time of its execution, that is, on the 10th of *November* 1812, the *Park Hall* estate, in respect of which the right of way is claimed, was vested in the two sisters, *Maria* the wife of *Thomas Smallwood*, and *Elizabeth Hector*, as coparceners in fee, claiming by descent from their father *Brooke Hector;* and that at the same time the *Woodseaves House* estate, which comprises the land over which the way extends and which came from their mother,

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mother, was vested in them, as tenants in common in tail general, under a settlement made upon their mother's marriage with their father *Brooke Hector*.

There can be no doubt therefore, as before observed, but that any right of way, which before the unity of seisin of these two properties might have belonged to the *Park Hall* estate, over the lands of the *Woodseaves House Farm*, became suspended in law from the moment when such unity of seisin commenced; and that such suspension of the right would continue until the unity of seisin should cease by the determination of the estate tail.

It appears, however, from the averment in the plea, which is admitted by the demurrer to be true, that, long before and at the time of the making of the said indenture, &c., the occupiers for the time being of the *Park Hall* estate had "*always* been used to have and enjoy a certain way," therein described, over the closes in which, &c., and back again, "*for the convenient use and occupation* of *Park Hall* aforesaid;" and that such way had, before and at the time of the making of the said indenture, &c., "*been always held, used, occupied, and enjoyed therewith.*" And that this was the very same way in dispute between the parties, is evident, as well from the fact that the defendants justify under it, as also because the plaintiff has not new assigned the trespasses as having been committed out of and beyond this way so described in the plea.

It appears therefore judicially to the Court that the way in question is a way that has *always* existed for the convenient use and enjoyment of *Park Hall*, and has *always* been held and occupied and enjoyed therewith; that is, not only before the unity of seisin of the land and way over it, but since and during such unity of seisin,

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seisin, and notwithstanding the legal effect of it, and indeed up to the very time of the execution of the deed.

This being so, the reasonable inference must be that, in a deed making a partition between the two sisters, it was the intention of the contracting parties that each sister should take the whole of the estate allotted to her as her share, in the same plight and condition, as to all its conveniences and means of enjoyment, as it was held and occupied at the time such partition was made; and that no reason can be suggested, à priori, for supposing that a way which had been always found useful and convenient for the enjoyment of the *Park Hall* estate, and which, for that purpose, had been always held and enjoyed by the tenants of *Park Hall*, and which continued so to be up to the very time of the partition made, should after the partition cease to be held and enjoyed for the same purpose by that sister to whom *Park Hall* was allotted. Indeed, so strong is that inference, that authorities are not wanting to shew that, where a way has been extinguished by the unity of seisin of two estates, by the partition of the two the way is revived. Thus it is laid down as law, in 1 *Jenkins's Centuries*, Ca. 37., that "a way is extinguished by unity of possession, and is revivable afterwards upon a descent to two daughters, where the land through which, &c. is allotted to one; and the other land to which the way belonged, is allotted to the other sister; and this allotment, without specialty, to have the way anciently used, is sufficient to revive it;" and to the same point is the authority of *Bro. Abr.*, title *Extinguishment*, 15, with this difference only, that he adds "tamen videtur que est novel chimin."

But, independently of this general inference of intention, resulting from the object of the parties being that

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that of effecting a partition, we think the intention of the parties, that the way should pass, is to be inferred more particularly from the frame and texture of the deed itself.

For the grantors convey to *Huxley*, the grantee, the lands comprised in *Park Hall*, and the lands comprised in *Woodseaves House Farm*, and all *ways*, *paths*, "*passages*," &c., "to the *said several* messuages," lands, and hereditaments "belonging or in any wise appertaining, *or therewith usually held*, *used*, *occupied*, *or enjoyed*, or accepted," &c., "as part, parcel, or member thereof." *Huxley* therefore takes, under the latter words, the way in question, which, according to the allegation in the pleadings, was held and enjoyed with *Park Hall*: and we can assign no object for which this way could have been granted to him, except it was intended to pass it through him with the land itself, upon the several uses which are subsequently declared as to *Park Hall*.

Upon the first head, therefore, we think the intention of the grantors to pass this way sufficiently appears; and that the only question is, whether there are words in the release sufficient, upon their legal construction, to pass such right of way. Now the deed of release, after describing the premises intended to be conveyed in the terms before adverted to, proceeds in the habendum thus:—"To hold the said messuages or tenements called *Park Hall* and *Park House*, with the buildings, lands, and hereditaments thereunto belonging, thereby before granted and released, and expressed and intended so to be, and every part and parcel thereof, with their and every of their *appurtenances*," unto the said *Thomas Huxley* and his heirs, to such uses as are therein declared. The deed then contains a covenant, on the part of

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of *Smallwood*, that he and his wife would levy a fine of the *Park Hall* and *Park House* estate, and that the said fine so to be levied "of the said several messuages or tenements, lands, hereditaments, *and premises* thereby before granted and released, or expressed or intended so to be," should enure, and that the said *Thomas Huxley* and his heirs should stand seised of all the same messuages or tenements, lands, hereditaments, *and premises*, and every of them, and of every part thereof, with the appurtenances, to the several uses, &c. thereinafter declared of and concerning the same respectively, (that is to say) as to, for, and concerning *the whole* of the said messuages and tenements called *Park Hall* and *Park House*, with the buildings, lands, hereditaments, and appurtenances thereunto respectively belonging, to the use of such person, &c. And we think that the word "appurtenances," where it occurs in that part of the habendum which relates to the *Park Hall* estate, and, again, where it occurs in the declaration of the uses of the fine, is not confined to that which is in legal strictness an appurtenant, such as an easement, the enjoyment whereof has never been interrupted by unity of possession or extinguished by unity of seisin, but that it will let in and comprehend the right of way which has been "usually held, used, occupied or enjoyed" with the *Park Hall* and *Park House* estate, as above expressed in the operative part of the deed itself, that is, the very way which is now in dispute. The deed itself forms a glossary for the word, by which glossary it is to be interpreted. (See the cases to this point well collected in the argument of counsel in the case of *The Marquis of Cholmondeley* v. *Lord Clinton* (*a*)).

(*a*) 2 *B.* & *Ald.* 637.

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It has been urged in argument that, even if the word "appurtenances" is capable of receiving a more enlarged meaning from the context, yet the way in and over the lands of the *Woodseaves* estate did not and could not pass by those general words, for the soil itself of both the estates passed to the same trustee. But to this it appears to us to be a sufficient answer, that, whilst the *Woodseaves* lands are conveyed to *Huxley* to the use of him and his heirs, to the intent that he may suffer a common recovery, *no estate* whatever is conveyed to him in the *Park Hall* estate, but he is a mere releasee to uses only. And, with respect to such releasee, it is a known doctrine that, since the statute, he takes no interest whatever in th .and; that on his account it can neither escheat no oe forfeited; nor is it subject either to dower or curtesy on account of his momentary seisin. And we know of no authority, and without it there is no reason for holding, that such momentary seisin of the land shall operate to extinguish a right of way by unity of seisin.

We therefore think we only construe the deed so as to carry into effect the manifest intention of the parties, when we hold the words of it to be sufficient, when explained by the context, to carry the right of way in dispute to the grantee of the *Park Hall* and *Park House* estate; and we think ourselves justified in such construction according to the well known principle, "benignè faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat."

On these grounds we give judgment of reversal.

Judgment reversed.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

AND

UPON WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

Easter Term,

In the Sixth Year of the Reign of WILLIAM IV.

The Judges who usually sat in Banc this term were,

Lord DENMAN C. J.	PATTESON J.
LITTLEDALE J.	COLERIDGE J.

REGULA GENERALIS.

Easter Term, 1836.

(Read in Court, *Monday*, *April* 18th.)

IT IS ORDERED, That the several Masters and Prothonotaries for the time being of the Courts of King's Bench, Common Pleas, and Exchequer, respectively, together with *Thomas Adlington*, *Jonathan Brundrett*, *George Frere*, *James William Freshfield*, *James Hall*, *Bryan*

1836. *Bryan Holme, William Lowe, Edward Rowland Pickering, Samuel White Sweet, William Tooke, Richard White,* and *Edward Archer Wilde,* gentlemen, attorneys, be and the same are hereby appointed examiners for one year now next ensuing, to examine all such persons as shall desire to be admitted attorneys of all or either of the said Courts, from and after the last day of this present term, and that any five of the said examiners, one of them being one of the said Masters or Prothonotaries, shall be competent to conduct the said examination in pursuance of and subject to the provisions of the rule of all the said courts made in this behalf in *Hilary* term last past.

Signed	DENMAN.	W. BOLLAND.
	N. C. TINDAL.	J. B. BOSANQUET.
	ABINGER.	E. H. ALDERSON.
	J. A. PARK.	J. PATTESON.
	J. LITTLEDALE.	J. GURNEY.
	J. VAUGHAN.	J. WILLIAMS.
	J. PARKE.	J. T. COLERIDGE.

REGULATIONS

Approved by the Judges in *Easter* term, 1836,

For the Examination of Persons applying to be admitted as Attorneys of the Courts of King's Bench, Common Pleas, or Exchequer, pursuant to the Rule of Court made in *Hilary* Term, 1836.

WHEREAS by a rule of the Courts of King's Bench, Common Pleas, and Exchequer, made in *Hilary* term, 1836, it was ordered, that the several Masters and Pro-

Prothonotaries, &c. [reciting Rule *Hil.* T. 6 *W.* 4., antè, p. 744.], 1836.

And whereas, by a rule of all the said Courts made in this present *Easter* term, it was ordered, that the several Masters and Prothonotaries for the time being of the said courts respectively, together with *Thomas Adlington*, &c. [reciting Rule of this term, antè, p. 767.],

In pursuance of the said Rules, the following regulations for conducting the said examinations have been submitted to, and approved by, the Judges of the said Courts: —

I. That every person applying to be admitted an attorney of any of the said courts, pursuant to the said Rules, shall, within the first seven days of the term in which he is desirous of being admitted, leave, or cause to be left, with the secretary of the said Incorporated Law Society, his articles of clerkship duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant, and also by the attorney or attorneys with whom he shall have served his clerkship.

II. That, in case the applicant shall shew sufficient cause, to the satisfaction of the examiners, why the first regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof being given of the same, to dispense with any part of the first regulation that they may think fit and reasonable.

III. That every person applying for admission shall also, if required, sign and leave, or cause to be left, with the secretary of the said society, answers in writing to such other written or printed questions as shall be

1836. proposed by the said examiners touching his said service and conduct; and shall also, if required, attend the said examiners personally, for the purpose of giving further explanations touching the same; and shall also, if required, procure the attorney or attorneys with whom he shall have served his clerkship as aforesaid, to answer, either personally or in writing, any questions touching such service or conduct, or shall make proof to the satisfaction of the said examiners of his inability to procure the same.

IV. That every person so applying shall also attend the said examiners at the hall of the said society, at such time or times as shall be appointed for that purpose, pursuant to the said rule, as the said examiners shall appoint, and shall answer such questions as the said examiners shall then and there put to him, by written or printed papers, touching his fitness and capacity to act as an attorney.

V. That, upon compliance with the aforesaid regulations, and if the major part of the said examiners, actually present at and conducting the said examination (one of them being one of the said Masters or Prothonotaries), shall be satisfied as to the fitness and capacity of the person so applying to act as an attorney, the said examiners so present, or the major part of them, shall certify the same under their hands in the following form, viz.: —

In pursuance of the rules made in *Hilary* and *Easter* terms, 1836, of the Courts of King's Bench, Common Pleas, and Exchequer, we, being the major part of the examiners, actually present at, and conducting the examination of *A. B.*, of &c., do hereby certify, that we have examined the said *A. B.* as required by the said rules,

rules, and we do testify that the said *A. B.* is fit and capable to act as an attorney of the said courts. 1836.

DENMAN.	W. BOLLAND.
N. C. TINDAL.	J. B. BOSANQUET.
ABINGER.	E. H. ALDERSON.
J. A. PARK.	J. PATTESON.
J. LITTLEDALE.	J. GURNEY.
S. GASELEE.	J. WILLIAMS.
J. VAUGHAN.	J. T. COLERIDGE.
J. PARKE.	

QUESTIONS AS TO DUE SERVICE,

To be answered by the Clerk.

I. What was your age on the day of the date of your articles?

II. Have you served the whole term of your articles at the office where the attorney or attorneys, to whom you were articled or assigned, carried on his or their business? and, if not, state the reason.

III. Have you at any time during the term of your articles been absent without the permission of the attorney or attorneys to whom you were articled or assigned? and, if so, state the length and occasions of such absence.

IV. Have you, during the period of your articles, been engaged or concerned in any profession, business, or employment, other than your professional employment as clerk to the attorney or attorneys to whom you were articled or assigned?

V. Have you, since the expiration of your articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor?

QUESTIONS AS TO DUE SERVICE,

To be answered by the Attorney.

I. Has *A. B.* served the whole term of his articles at the office where you carry on your business? and, if not, state the reason?

II. Has the said *A. B.*, at any time during the term of his articles, been absent without your permission? and, if so, state the length and occasions of such absence.

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III. Has the said *A. B.*, during the period of his articles, been engaged or concerned in any profession, business, or employment, other than his professional employment as your articled clerk?

IV. Has the said *A. B.*, during the whole term of his clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of an attorney or solicitor?

V. Has the said *A. B.*, since the expiration of his articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor?

And I do hereby certify that the said *A. B.* hath duly and faithfully served under his articles of clerkship (or assignment, as the case may be) bearing date &c., for the term therein expressed, and that he is a fit and proper person to be admitted an attorney.

In the Common Law Courts, at the Judges' Chambers, and at all the Law Offices, the following notice was posted up: —

Examination of Attorneys under the Rules of Hilary and Easter Terms, 1836.

The articles of clerkship, and answers to questions touching the due service and good conduct of persons applying to be admitted attorneys, are to be left with the secretary of the Incorporated Law Society, at the hall in Chancery Lane, within the first seven days of term (viz. between the 23d and 30th of *May* inclusive).

The first examination will take place at the hall of the Incorporated Law Society, on *Saturday*, the 4th of *June*, and commence at ten o'clock in the forenoon. The applicants are required to attend in the hall at half-past nine on the day of examination.

Application for further information may be made to the secretary.

17th *May* 1836. *R. Maugham.*

Ex parte CHAPMAN, Esquire.

Friday, April 15th.

The Court will not grant a criminal information for calling a magistrate a liar, accusing him of misconduct in reference to his having absented himself from an election of clerk to the magistrates, and threatening a repetition of the same language whenever such magistrate came into the town, unless there appear an intention to provoke a breach of the peace.

SIR *JOHN CAMPBELL*, Attorney-General, on behalf of *John Chapman*, Esquire, a magistrate of the borough of *Bridgewater*, moved for a rule to shew cause why a criminal information should not issue against *John William Trevor* and his son. The son had held the place of clerk to the magistrates of the borough, up to *February* last, when the other magistrates, in Mr. *Chapman*'s absence, elected another person to fill the office. *Trevor*, the father, subsequently complained in violent terms to Mr. *Chapman* of the transaction, and repeatedly called him a liar, and, in the presence of several persons, said that he was unfit to be a magistrate, and added that he should hear the same every time he came into the town. It was also sworn that *Trevor*, the son, had stated that Mr. *Chapman* had absented himself from the election on purpose. [Lord *Denman* C. J. How could you frame an indictment on these facts?] They would support a charge that the two conspired to defame Mr. *Chapman*'s character as a magistrate. There is at all events evidence for a jury, that the words were spoken of him in his character of magistrate; and it may, therefore, be laid as a misdemeanor, independently of the conspiracy. It certainly is not alleged that there was an intent to provoke a breach of the peace.

Lord DENMAN C. J. I think it would not be proper to grant this rule. I do not see my way clearly enough

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Ex parte CHAPMAN.

to treat this as a misdemeanor. I recollect a case where a rule was granted for words spoken against a magistrate, which was afterwards discharged, because they appeared to be spoken with reference, not to his conduct as a magistrate, but to his voting as an elector to some office. In the present case I at first thought the tendency of the words had been to provoke a breach of the peace.

PATTESON and COLERIDGE Js. (*a*) concurred.

Rule refused.

(*a*) *Littledale* J. was absent on the Western circuit.

Saturday, April 16th.

HOPKINS *against* JAMES CROWE.

A hired driver of a cabriolet, having brought home the horse apparently much ill-used by him, the owner's son (in the owner's absence) called in a policeman, and told him that the driver had ill-used the horse. The policeman said that, if the complainant charged the driver with cruelty to the horse, he would take him into custody; the complainant said, "I do;" and the policeman apprehended the driver, under stat. 5 & 6 *W.* 4. *c.* 59. *s.* 9.

Held, that the complainant must be considered, not as a party giving information to the officer in consequence of which he was arrested, but as a principal causing the arrest to be made; and that he was not entitled to notice of action, which the statute requires to be given to persons sued for anything done in pursuance of it.

TRESPASS for assaulting and seizing plaintiff, compelling him to go to a station-house of the police, and imprisoning him there. Plea, Not Guilty. On the trial before Lord *Denman* C. J. at the sittings in *Middlesex* after last term, it appeared that the defendant's father, *Robert Crowe*, a proprietor of cabriolets, had employed the plaintiff as a driver: that the plaintiff one night, at a late hour, having been out with a cabriolet and horse belonging to *Robert Crowe*, brought the horse home much distressed, and apparently ill-used: that the defendant, who was sitting up (in the absence of his father), called in a policeman and said to him,

"Here

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"Here is a man who has brought me home no money, and has ill-used my horse; I shall give him in charge:" that the policeman said he could have nothing to do with the money, but that, if the defendant charged the plaintiff with cruelty to the horse, he would take him into custody: that the defendant said, "I do," and the policeman thereupon took the plaintiff to the station-house, where the defendant charged him before the inspector with ill-using the horse. Sir *F. Pollock*, for the defendant, submitted that, if he had a bonâ fide intention to act under the statute 5 & 6 *W.* 4. *c.* 59. sects. 2 and 9, he was entitled to notice of action under sect. 19 (*a*): and, further, that the acts done by him were justified by sect. 9. The Lord Chief Justice held that the defendant, not being the owner of the horse, was not within the protection of the act, or entitled to notice, if he had directed the constable to apprehend the plaintiff. His Lordship refused to put the question of

(*a*) Stat. 5 & 6 *W.* 4. *c.* 59. *s.* 2. imposes penalties (to be recovered on conviction before a justice) upon persons wantonly and cruelly ill-treating any horse, &c.

Sect. 9. is as follows: — "And, for the more easy and effectual apprehension of all offenders against this act, be it further enacted, That when and so often as any of the said offences shall happen it shall and may be lawful to or for any constable or other peace officer, or for the owner of any such cattle or animal, upon view thereof, or upon the information of any other person (who shall declare his, her, or their name or names and place or places of abode to the said constable or other peace officer), to seize and secure by the authority of this act, and forthwith and without any other authority or warrant to convey any such offender before any one justice of the peace within whose jurisdiction the offence shall have been committed, to be dealt with according to law."

Sect. 19. enacts, that in all actions "for any thing done in pursuance or under the authority of this act," fourteen days' notice in writing of such action and the cause thereof, shall be given to the defendant, who may plead the general issue and give this act and any other matter in evidence; and, if notice of such action shall not have been given in manner aforesaid, the jury shall find a verdict for the defendant.

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bona fides to the jury, but told them that, if the defendant had not directed the constable to apprehend, but had merely given him information, he was entitled to a verdict. The jury found for the plaintiff, damages 5*l*.

Sir *F. Pollock* now moved, by permission, for a rule to shew cause why a nonsuit should not be entered. The defendant might reasonably suppose that he was acting under the statute; and he was therefore entitled to notice. If he had been the owner, he would himself have been warranted in apprehending the plaintiff. But any person may give information to an officer for the purpose of causing an offender against the act to be apprehended; and the defendant, though not present at the ill usage, was justified, by what he saw, in making a charge against the plaintiff. If, in so doing, he did not use sufficient caution and particularity, he was still acting in pursuance of the statute, and entitled to the protection of notice, even if he was not altogether justified. *Pratt* v. *Hillman* (*a*), where the defendant, having proceeded erroneously under the Building Act, 14 *G.* 3. *c.* 78., was held entitled to notice under that act, is a similar case in principle. [*Patteson* J. The persons justified by sect. 9 of this act are a constable or the owner, acting upon view or information given as is there pointed out. It is not under the statute that persons are enabled to give information; any one might do that, at common law.] At least, if a party give it, but without sufficient particularity, he is not, therefore, liable to an action for false imprisonment. [*Patteson* J. Your argument would come to this, that the action ought to have been for maliciously charging the plaintiff.] The

(*a*) 4 *B.* & *C.* 269.

question

question is, whether the defendant really intended to act under the statute. The word "information" must be taken in the popular, not the legal, sense.

PATTESON J. (*a*) This case is very clear. It was proved that the defendant not only told the officer something which he professed to know, but took upon himself to direct the officer to apprehend the plaintiff. He made the officer his servant for that purpose; and he is, therefore, liable in trespass. Then is he entitled to the protection of the statute? Section 9 of stat. 5 & 6 *W.* 4. *c.* 59. extends only to an officer, or the owner of an animal ill treated, acting upon view or information. The defendant was neither officer nor owner. It is said, that he was, nevertheless, entitled to the protection of notice, because he acted bonâ fide. But to what extent would such a rule go? For example, by a late act as to game, persons trespassing on lands may, in certain cases, be arrested by the occupier of the land or his servant, or other persons having certain authorities; and, in actions for anything done in pursuance of that act, notice of action is required, and other restrictions are imposed (*b*). According to the argument used to day, a person not being owner or occupier of the lands, nor otherwise authorised, but thinking himself entitled to act, might arrest a trespasser, and, if sued, insist upon the protections of the statute. In *Pratt* v. *Hillman* (*c*) the defendant was the party described by section 42 of the Building Act, 14 *G.* 3. *c.* 78., and having the right to proceed under that clause, though he had taken a wrong step; he was consequently entitled to

(*a*) *Littledale* J. was absent. See page 774. antè.

(*b*) 1 & 2 *W.* 4. *c.* 32. *ss.* 31, 47. (*c*) 4 *B.* & *C.* 269.

notice

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notice under section 100 of the same act. The defendant here is not the person described by stat. 5 & 6 *W.* 4. *c.* 59. *s.* 9.

COLERIDGE J. It is not necessary to infringe upon the case of *Pratt* v. *Hillman* (*a*), or upon many others which shew that, where a person has actually proceeded under a statute giving the kind of protection here claimed, he is entitled to the benefit of such statute, if he bonâ fide intended to act in pursuance of it. Here, the defendant is not brought within the act. If he had been a mere informer, sued as having given a defective or overcharged information, he might have been protected, according to the argument used to-day: but he was a principal, making an arrest by the hand of the police officer.

Lord DENMAN C. J. I think that a verdict contrary to that given would have been wrong. The words used by the defendant were, in effect, a direction to the officer to arrest; and the defendant was not the description of person authorised by the statute to arrest, or entitled to protection according to the cases which have been referred to. The ninth section applies only to an owner or peace-officer himself seeing the nuisance of cruelty committed, or having information of it from another person, as directed by the statute. But the information meant is not the kind of communication made in this case: it is to be a substitute for view. To say, "I charge this person with cruelty to the horse," is giving no information.

Rule refused.

(*a*) 4 *B.* & *C.* 269.

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In the Matter of HANCOCK.

Saturday, April 16th.

The Court allowed an attorney to be admitted without a full term's notice, where all the other requisites had been complied with, and it appeared to be essential to his interests in his profession that he should sail for *India* before the regular time of notice would expire. The application was made on the second day of the term, and the admission was ordered to be on the last day of the same term.

SIR *W. W. FOLLETT* applied that *George Hancock* might be admitted an attorney of this Court on the last day of this term, without giving a full term's notice. It appeared that *G. H.* had served his time under articles, that he had intended to leave *England* about the end of next *Trinity* term, for the purpose of practising as an attorney in the superior courts at *Bombay*; for which purpose it was essential that he should be admitted in a superior court in this country: that his brother (from circumstances mentioned in the affidavit) was obliged to proceed to *Bombay* speedily, and had taken his passage on board a ship which was under an engagement to the *East India* Company to sail on the 9th of *May* next (last day of *Easter* term), and that the brother would, during the voyage, instruct *G. H.* in the *Hindostanee* language, which would be of great service to him in his profession. Other circumstances were stated, shewing that it was important to *G. H.* in his profession to accompany his brother on the voyage; and it was further stated that the brother would be obliged to quit *Bombay* immediately on his arrival. Notices had been affixed at the King's Bench Office, at the Judges' chambers, and on the outside of the Court, and had been left with the secretary of the Incorporated Law Society, stating the usual particulars, and also the intention to make this application. The application had been made before *Patteson* J. at chambers; but the learned judge doubted whether he had the

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In the Matter of HANCOCK.

the requisite power at chambers. Sir *W. W. Follett* now referred to *Ex parte Hulme* (*a*).

Per Curiam (*b*). Ordered, that the said *George Hancock* be sworn, enrolled, and admitted an attorney of this Court, on the last day of this term, upon producing all the necessary documents for that purpose.

(*a*) 4 *Dowl. P. C.* 88.
(*b*) Lord *Denman* C. J., *Patteson* and *Coleridge* Js.

Monday, April 18th.

In the Matter of RIDLEY.

A party applying, on the first day of *Easter* term, to be admitted an attorney in that term, had affixed his notices in a name which he had taken since the expiration of his articles, having served in another name, to which his notices did not refer. The Court allowed him to be admitted, after affixing notices in both names for the rest of *Easter* term.

ON the first day of this term (*a*) *W. H. Watson* applied for the admission of an attorney during the term. After the service under his articles, he had, in *May* 1835, changed his name from that which he bore during the service, to *Ridley*, and had always been known and done all acts since by that name. He had subsequently fixed up his notices under the name of *Ridley*, without any reference to his former name. There did not appear to be any reason to suppose that he had not acted bonâ fide. *W. H. Watson* contended that this was a compliance with the rule of *T.* 31 *G.* 3. (*b*) which uses only the word "name."

Cur. adv. vult.

This day, Lord *Denman* C. J. said that the party might fix up notices stating both names, to remain during the whole of this term, and, if no caveat was then entered, he might be admitted at the end of the term.

(*a*) Before Lord *Denman* C. J., *Patteson* and *Coleridge* Js.
(*b*) 4 *T. R.* 379.

In the Matter of PRANGLEY.

Monday, April 18th.

NOTICE had been given to the Master, by *Prangley*, on the 12th of this month, of his intention to apply for admission as an attorney in next term. The Master received the notice, but was doubtful as to its validity, term beginning on the 15th, and the rule of *H.* 6 *W.* 4. s. 5. (*a*) requiring three days' notice at the least before the commencement of the term. The case was mentioned to the Court, at the Master's suggestion, on the first day of this term, by

Three days' notice must be given to the Master, under the rule of *Hil.* 6 *W.* 4., by persons applying to be admitted attorneys, exclusive of the day on which the notice is given, and of the first day of the term to which it relates.

Steer, who contended that the notice was given in good time, and referred to the rule *H.* 2 *W.* 4. VIII. (*b*), as shewing that one day should be taken inclusively and the other exclusively, and stated that the applicant had acted bonâ fide upon such a construction of the rule *H.* 6 *W.* 4. [Lord *Denman* C. J. We will confer with the other Judges.]

Cur. adv. vult.

Lord DENMAN C. J. now said, In the present case we will consider the three days, one inclusive and the other exclusive, as a sufficient notice: but in future there must be three clear days, at the least, between the day on which the notice was given, and the first day of the term to which it relates.

(*a*) Antè, 747. (*b*) 3 *B.* & *Ad.* 393.

Monday, April 18th.

DOE on the Demise of OGLE and Others *against* VICKERS.

V. mortgaged land in fee to *O.*; afterwards, and while *V.* remained in possession, *S.*, claiming by a title anterior to the mortgage, brought ejectment against *V.*, and a verdict was taken against him by consent, subject to arbitration as to what lease *S.* should grant to *V.* *S.* granted a lease to *V.*, in pursuance of the award made. Held, that *V.* could not set up such lease as an answer to an ejectment brought by *O.*

EJECTMENT for land in *Shropshire*. On the trial, at the last *Shrewsbury* assizes, before *Williams* J., the lessors of the plaintiff proved that in 1824 the defendant executed a mortgage to them, of the lands in question, in fee. Subsequently, the Earl of *Shrewsbury* and the Earl of *Berwick* brought ejectment against the defendant, who was still in possession, each for one undivided third part of the lands, claiming by title anterior to the mortgage; and, on the trial in 1829, a verdict was taken by consent for the plaintiff, subject to the award of a barrister, who was to direct what lease the then lessors of the plaintiff should grant to the defendant. The arbitrator awarded that a lease, on certain terms, should be granted to the defendant, of the two thirds, by the Earls of *Shrewsbury* and *Berwick*, which lease was afterwards executed, and was unexpired at the time of the present action. The defendant had now suffered judgment as to one undivided third, and contended that the plaintiffs could not recover the other two undivided third parts, as the defendant held them by a title acquired subsequently to the mortgage, and upon which the mortgage could not operate. The learned Judge was of opinion that the defendant was not entitled to insist upon this lease, as against the mortgagees, and directed a verdict for the plaintiff.

Talfourd

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Doe dem. Ogle against Vickers.

Talfourd Serjt. now moved for a rule to shew cause why the verdict should not be set aside for misdirection, and a new trial had. The defendant must be considered as having acquired a fresh title since the mortgage. The mortgagees have only such title as the defendant had before the lease. The doctrine of estoppel is inapplicable here; though, perhaps, a court of equity might regard the defendant as trustee for the lessors of the plaintiff in the present case, on the ground that he was bound to perfect his title for his mortgagees; or, probably, he might be ordered to assign the lease to them. But, in point of law, he stands in the same situation as if he had been actually evicted, and had bought the land from the party evicting.

Lord DENMAN C. J. He mortgages the land as his own; then ejectment is brought against him by a third party, in which he consents to a verdict, and takes a fresh lease from that party: what effect can this have as between himself and his mortgagees?

LITTLEDALE J. If he found that the Earls of *Shrewsbury* and *Berwick* had a title superior to his own, it was his duty to get a good title. He cannot set up such a title, after he has obtained it, as an answer to this ejectment.

PATTESON and COLERIDGE Js. concurred.

Rule refused (*a*).

(*a*) See *Doe dem. Hurst* v. *Clifton*, 809. post.

Monday April 18th.

DOE on the several Demises of JOHN MEE and THOMAS LEIGH, of JOHN MEE, of THOMAS LEIGH, and of JANE LIGHTFOOT MEE, *against* MARY LITHERLAND, RICHARD MEE, JAMES LEIGH, and GEORGE LIGHTFOOT.

Ejectment against *T.*, the tenant in possession, and *L.*, who came in to defend as landlord. The lessor of the plaintiff having proved his title against *L.*, the latter set up the title of the tenant *T.*, who had paid rent to the lessor of the plaintiff as tenant from year to year. In order to shew the determination of *T.*'s interest, the lessor of the plaintiff produced an admission signed by *T.* after the commission day of the assizes, whereby he acknowledged having attorned to *L.*, upon *L.*'s executing a writ of possession in a prior ejectment. Held, that this admission was evidence against *L.* as well as *T.*

EJECTMENT for premises in *Lancashire*. On the trial before Lord *Denman* C. J., at the last *Liverpool* assizes, it appeared that both parties claimed under *William Lightfoot*, who died in 1824, entitled to the residue of a term of 999 years, leaving *John Mee* and *Thomas Leigh* his executors and devisees in trust. The defendants *Mary Litherland*, *Richard Mee*, and *James Leigh*, held the premises as tenants to *William Lightfoot*, up to and at the time of his death, and had paid rent to him accordingly; and, since his death, they had paid rent to *John Mee* and *Thomas Leigh* up to *August* 1835. The demises were laid in *October* 1835. The lessors of the plaintiff proved their title to the leasehold interest; and, in order to shew the determination of the interest of the three first named defendants, the plaintiff produced an admission, signed by the three after the commencement of this action and the commission day of the assizes, that they had attorned to the fourth defendant, *George Lightfoot*, who had obtained judgment against them in ejectment, and had taken out a writ of possession. On this evidence the Lord Chief Justice directed a verdict for the plaintiff, reserving leave to the defendants to move to enter a verdict for them.

Crompton

1836.

Doe dem. Mee against Litherland.

Crompton now moved accordingly. It was necessary to shew a title as against all four of the defendants; but, as against *George Lightfoot*, there was no evidence of the determination of the interest of the other three defendants. An actual disclaimer, after the commencement of the action, would not make a forfeiture of which advantage could be taken in this action; *Doe dem. Lewis* v. *Cawdor* (*a*). The admission may be evidence of a disclaimer antecedent to the demise, as against the parties making it; but such an admission is no evidence against *George Lightfoot*. In *Doe dem. Grubb* v. *Grubb* (*b*) there was a distinct act implying a disclaimer antecedent to the action; but in this case there is only an admission of such disclaimer, which admission was after action brought, and was made for the purpose of the cause. It was not evidence against *George Lightfoot*. The case here stands as if *George Lightfoot* were the sole defendant; in that case the admission of third persons would not be evidence as against him. [Lord *Denman* C. J. How does *George Lightfoot* defend?] Probably as landlord; the other three are the tenants in possession.

Lord DENMAN C. J. Assuming that, *George Lightfoot* must stand or fall by the title of the tenants: if they have no right he has none; and if they are beaten he must fail.

LITTLEDALE J. If he defends as landlord in the right of the tenant, and that fails, his must fail too. If he enters into the consent rule as landlord, the admis-

(*a*) 1 *Cr. M. & R.* 398. *S. C.* 4 *Tyrwh.* 852. (*b*) 10 *B. & C.* 816.

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Doe dem. Mee *against* Litherland.

sion of the tenants as to their title is evidence against him.

Patteson J. He is identified with the tenants as to this matter, by defending as landlord, and entering into the consent rule in that character.

Coleridge J. concurred.

Rule refused.

Monday, April 18th.

Wise *against* Charlton.

An instrument which, in other respects, was a promissory note, and had been properly stamped as such before making, contained in the body of it a memorandum that the maker had deposited certain title deeds with the payee as a collateral security. After it was made, it was stamped with a proper mortgage stamp on payment of the penalty.

Held, that this was an assignable promissory note under stat. 3 & 4 *Ann.* c. 9. s. 1., and that it might be sued on by an indorsee, though the mortgage stamp was put on after the making, and though there was no assignment stamp.

If an instrument containing a mortgage be also a promissory note, it may still be stamped with a mortgage stamp, after the execution, provided it has a promissory note stamp on it at the time it is executed.

Assumpsit by the indorsee of a promissory note against the maker. The declaration (which was filed before the operation of the rules *Hil.* 4 *W.* 4.) described the note as made 16th of *April* 1823, in favour of *John Goodwin Johnson* or order, payable on demand, with lawful interest, for value received; and indorsed by *Johnson* to the plaintiff; and it averred a demand on 2d of *September* 1833. Plea, non assumpsit. On the trial before Lord *Abinger* C. B., at the last *Derby* assizes, the note was produced; and it was in the following form: —

"£120. 16th of *April* 1823.

"On demand I promise to pay to Mr. *John Goodwin Johnson* or order the sum of one hundred and twenty

pounds,

pounds, with lawful interest for the same for value received; and I have deposited in his hands title deeds to lands purchased from the devisees of *William Toplis*, as a collateral security for the same.

"*W. Charlton.*"

To this note there was a proper promissory note stamp at the time it was signed by the defendant, and a stamp of 2*l.* (the proper stamp for a legal or equitable mortgage of the amount of the note) had been imposed on payment of a penalty, subsequently to the commencement of the action. It appeared that the payee *Johnson*, and the plaintiff *Wise*, were partners as attorneys; that the note had been prepared by *Wise*, and the deeds mentioned in it left with him; but that, several years before the indorsement of the note to *Wise*, he, *Wise*, had delivered back the deeds to the defendant. It was objected, on the part of the defendant, that the latter stamp was unavailable, as having been made by the commissioners without authority; that, even supposing the commissioners had authority to stamp a promissory note after it was made, yet an assignment stamp was also requisite to enable an assignee to sue upon this instrument, and that it was an agreement and equitable mortgage, and not a promissory note assignable under stat. 3 & 4. *Ann. c.* 9. *s.* 1. The Lord Chief Baron received the note in evidence, but reserved leave to move to enter a nonsuit. The case went to the jury on some disputed facts respecting the consideration, and the plaintiff had a verdict.

Whitehurst now moved for a rule to shew cause why a nonsuit should not be entered, or a new trial had

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WISE *against* CHARLTON.

for misdirection. First, the commissioners had no authority to affix the 2*l.* mortgage stamp after the note was made, if the instrument is to be considered a promissory note. By stat. 23 *G.* 3. *c.* 49. *s.* 14., and stat. 31 *G.* 3. *c.* 25. *s.* 19., the paper upon which promissory notes are drawn must be stamped before the note is made. And by the latter statute the commissioners are expressly prohibited from stamping any *paper* &c. upon which a promissory note shall be written; and a note, not duly stamped, is not available in law or equity. Stat. 37. *G.* 3. *c.* 136. *s.* 1. enables the commissioners to stamp certain instruments after they are executed, upon the payment of a penalty; but that statute expressly excepts the *paper* upon which promissory notes may be written. The commissioners, therefore, had no authority to affix any stamp upon this paper upon which a promissory note had before been written. And sect. 5. of the act does not apply to a note which, when made, had not any stamp of the proper amount; *Green* v. *Davies* (*a*), *Butts* v. *Swan* (*b*). The regulations of former statutes on this subject are made applicable to the present stamp act, 55 *G.* 3. *c.* 184., by sect. 8. of that act. But, secondly, assuming that the commissioners had authority to affix the 2*l.* mortgage stamp after the note was made, and that that stamp would have been sufficient (stat. 55. *G.* 3. *c.* 184. *sched. part* 1. *Mortgage*) if the payee of the note himself had sued upon the note, yet, as the security has been assigned over, an additional stamp of 1*l.* 15s. was necessary (stat. 3 *G.* 4. *c.* 117. *s.* 2.); for the assignment of the note is an assignment of the equitable mortgage

(*a*) 4 *B.* & *C.* 235. (*b*) 2 *B.* & *B.* 78.

contained

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contained in the note. Thirdly, this was not an assignable promissory note, under stat. 3 & 4. *Ann. c.* 9. *s.* 1. It was an agreement, by which the maker undertook to pay *Johnson* the sum mentioned in the note, and *Johnson* undertook, on such payment, to deliver back the deeds. While the instrument was in the hands of the payee, the maker was entitled to require the re-delivery of the deeds upon the payment of the money, and was not bound to pay if that re-delivery were refused. It never could have been the intention of the parties that, *Johnson* should have a right to hand over the defendant's title deeds, and that they should pass from hand to hand; nor could *Johnson* transfer the note without the deeds; for the defendant had a right to insist upon the delivery of the deeds from the person who had the note. It can make no difference that the deeds had been delivered up to the defendant before the indorsement; for a note which is not transferable at the time it is made, is not rendered so by any subsequent event (*a*). The present plaintiff cannot be in a better situation than *Johnson*. An agreement to pay money on re-delivery of deeds cannot constitute a promissory note under the statute of *Anne*, any more than a conditional order to pay would be a bill of exchange within the custom of merchants: the two securities are placed on the same footing by the statute. [*Littledale* J. In the case of a mortgage, or a deposit, the debt may be sued for by the mortgagee without delivering up the deeds. *Coleridge* J. How can a collateral security fetter the principal security?] The securities are given by the same instrument; and the effect of the one is

(*a*) *Hill* v. *Halford*, 2 *B.* & *P.* 413.

therefor

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therefore controlled by the other. [He then commented upon the evidence, and upon the remarks made upon it by the Lord Chief Baron to the jury.]

Lord DENMAN C. J. With respect to the admissibility of the note in evidence, if it be a promissory note the stamp is right. And there is nothing to qualify its character. There is only a memorandum added of something else: but that is not imported into the main agreement.

LITTLEDALE J. This is an absolute promissory note; and there is no qualification. There is a memorandum, that deeds are deposited as a collateral security; but, as a note, the instrument is quite valid without a mortgage stamp. Besides, the restriction, which prohibits stamping a promissory note after it is made, applies only to the promissory note stamp: the fact that an instrument, which, in the character of a mortgage, may be stamped after it is made, contains also a promissory note, amounts to nothing. The meaning of the legislature was, merely, that parties should not take their chance on a promissory note by delaying the stamping till they wanted to produce it in evidence as a promissory note: but that does not prevent a mortgage, which happens also to be a promissory note, from having a mortgage stamp put on after it is made. *Butts* v. *Swann* (*a*) was a very different case. There the agreement stamp, put on after the instrument was made, was held insufficient, because the order to pay the money was so incorporated with the instrument

(*a*) 2 *B.* & *B.* 78.

that

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that the latter could not be used without calling in aid its operation as a promissory note. We need not enter into the question, whether it be necessary that there should be an assignment stamp. I do not know that an assignee of this instrument could at law avail himself of it, against the maker, as a mortgage.

PATTESON J. This is not the less a promissory note, from its being also an agreement of another kind. The cases cited by Mr. *Whitehurst* apply merely where there has been no promissory note stamp before the making.

COLERIDGE J. If this be a promissory note, no difficulty remains. It is not the less a promissory note, from a memorandum of another kind being added, importing that a collateral security has also been given.

The Court took time for consideration as to the other grounds of motion; and afterwards (*May* 5th) the rule was

Refused.

Tuesday, April 19th.

BARTLETT *against* ANN PURNELL.

Whether an auctioneer be the agent of both purchaser and seller depends upon the facts of the particular case. Therefore, where a party, to whom money was due from the owner of goods sold by auction, agreed with the owner, before the auction, that the goods which he might purchase should be set against the debt, and became the purchaser of goods, and was entered as such by the auctioneer, it was held that he was not bound by the printed conditions of sale which specified that purchasers should pay a part of the price at the time of the sale, and the rest on delivery.

ASSUMPSIT for cattle, and goods, sold and delivered, and on an account stated. Plea, non assumpsit. On the trial before *Bolland* B. at the last *Somersetshire* assizes, it appeared that the cattle and goods were put up to sale by public auction, under printed conditions of sale, according to which purchasers were to pay a certain per centage of the price at the sale, and the rest on delivery: that the defendant became the purchaser of goods to the amount of 145*l.*, and that her name was written down as such, at the time of the auction, by the auctioneer. The plaintiff was the executor of the late husband of the defendant, who claimed a legacy of 200*l.* under the will. The goods sold had been the property of the husband. On cross examination of the plaintiff's witnesses, it appeared that, a short time before the sale, the plaintiff told the defendant that she might purchase goods to any amount under 200*l.*, and that it should go towards the legacy of 200*l.* This evidence was objected to, on the part of the plaintiff, as tending to vary the printed conditions of sale; but the learned Judge received it, and told the jury that, if they believed that by the contract between the parties the legacy was to be set against the price of the goods, the claim was answered. The jury found for the defendant; and the learned Judge gave the plaintiff leave to move to enter a verdict for the plaintiff for 145*l.*

Erle

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BARTLETT against PURNELL.

Erle now moved accordingly. The auctioneer was the agent of the defendant; and, by his writing down her name, she became a purchaser under the printed conditions. In *Gunniss* v. *Erhart* (*a*) it was held that declarations, made by the auctioneer at the time of the sale, could not be received for the purpose of varying the printed conditions. *Powell* v. *Edmunds* (*b*) and *Shelton* v. *Livius* (*c*) are to the same effect. [*Coleridge* J. The defendant said that she did not purchase at the sale. *Patteson* J. Your authorities relate merely to alterations made in the conditions of sale, affecting all purchases at the sale: the question here is, whether the purchase was under the sale by auction at all.] That cannot be disputed, after the plaintiff's name has been taken down as highest bidder. The defendant, in order to prevent this from having the usual legal effect, should have told the auctioneer, at the time of the sale, that she was not purchasing under the conditions.

Lord DENMAN C. J. The jury must be taken to have found that the bargain related to the goods purchased at the sale, subject to the opinion of the Court whether the bargain could be given in evidence. I do not see why it should not, as it took place before the auction. The objection made is, that the auctioneer took down the defendant's name at the sale. No doubt an auctioneer may be agent for both parties: but here the bargain was, that what the defendant should buy was to be set off against the legacy. We do not overrule the former cases; but we consider them inapplicable. The auctioneer is not, ex vi termini, agent for both

(*a*) 1 *H. Bl.* 289. See *Jones* v. *Edney*, 3 *Campb.* 285.
(*b*) 12 *East*, 6. (*c*) 2 *Cr. & J.* 411. 2 *Tyrwh.* 420.

parties:

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parties: that depends upon the facts of the particular case.

LITTLEDALE J. Goods are put up to auction; and a person to whom 200*l.* is due agrees to purchase, on the terms of the price being set against the debt, and goes to the auction in pursuance of this special agreement. It is said that the auctioneer is her agent: but it does not appear that he was so here. He put her name down; but the auctioneer must do so; he gives a bond to the commissioners of excise conditioned for his accounting for the duty. Then the sale to the defendant was exempted from the general conditions of the sale; and she was entitled therefore to set off the legacy.

PATTESON J. We do not infringe upon former cases by refusing to grant this rule. When a party purchases under conditions of sale, he cannot give evidence to vary the contract. But here, properly speaking, the defendant does not so purchase. The bargain is made, subject to the original contract as to the payment.

COLERIDGE J. The point suggested by Mr. *Erle* does not arise upon the facts. The question is, whether the defendant bought at all at this auction. If she did, there must be a verdict against her, as the record stands: but the jury were right in saying that she did not. The conversation was good evidence of that: she was to take the goods; but they were to be reckoned at the highest price bidden for them. The auctioneer wrote the name down; but that was merely the necessary way of fixing such price.

Rule refused.

LAY *against* LAWSON.

Tuesday, April 19th.

Declaration complained that defendant published an advertisement in a newspaper, stating that a capias had issued against plaintiff, and that it had been impracticable to take him, and offering a reward for such information to be given to the sheriff's officer as would enable him to take plaintiff; innuendo that plaintiff was in indigent circumstances, incapable of paying the debt, and keeping out of the way to avoid being served with process. Plea, that a capias had been issued, indorsed for bail, and delivered to the sheriff; that defendant had kept out of the way to avoid being taken; that the sheriff's officer had been unable to take him; and that defendant had published the advertisement, at the request of the party suing out the writ, within four calendar months of the date of the writ, to enable the sheriff and his officer to arrest. Held, a justification.

CASE for libel. The first count stated that the plaintiff was the keeper of an hotel, and that the defendant printed and published in the *Times* newspaper a certain false &c., of and concerning the plaintiff, as follows:—"Mr. *Joseph Lay*" (the innuendoes identifying this name with the plaintiff throughout.). "Whereas a writ of capias dated the 15th day of *June* last has been issued against Mr. *Joseph Lay* late of No. 31. *Edgware Road*, hotel-keeper, but it has hitherto been impracticable to effect a caption, a reward of *5l.* will be paid to any person who will give such information to Mr. *Selby*, sheriff's officer, of No. 31. *Chancery Lane*, as shall enable him to take the said *Joseph Lay*. The reward will only be paid on the caption being made." The libel was then further set out, describing the person of the plaintiff, and the following innuendo was added; "thereby then meaning that the plaintiff was in bad and indigent circumstances, and incapable of paying his just debts, and that he was keeping out of the way in order to avoid being served with process for debt." The second count stated the libel to be in the form of and as an advertisement.

Pleas, 1. Not Guilty. 2. That heretofore, and before the time &c., to wit, &c., one *Henry Cleeve*, according to the form &c., had sued and prosecuted, out

of

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of the Court of Common Pleas in the county of *Westminster*, a certain writ of our Lord the King called a writ of capias against the plaintiff, directed to the Sheriff of *Middlesex*, and dated &c., by which writ our said Lord the King commanded the said sheriff &c. (setting out the capias); which said writ afterwards, and before the delivery thereof to the said sheriff to be executed as is hereinafter mentioned, to wit on &c., was marked and indorsed for bail for 80*l.* by affidavit, according to the form &c., and which writ so indorsed, afterwards, to wit on &c., was delivered to *Alexander Raphael* Esq., and *John Illidge* Esq., who then and from thence until and at the time &c. were sheriff of the said county of *Middlesex*, in due form of law to be executed; that afterwards, and before &c., to wit, on the day and year last aforesaid, and from thence continually afterward until the times of the committing &c., the plaintiff hid and concealed himself, and kept out of the way, in order to avoid being taken and arrested by the sheriff; and thereby the plaintiff did, for and during all that time, hinder and prevent the said sheriff from taking and arresting him upon and by virtue of the said writ at the suit of the said *H. C.* for the cause aforesaid, although the said *A. R.* and *J. I.*, as such sheriff, did during that time use and employ all necessary means &c. in that behalf; that the writ of capias in this plea mentioned, and the writ of capias in the said supposed libels respectively mentioned, are respectively the same writ and not other &c. And that, the plaintiff remaining and continuing so concealed as aforesaid, and the said sheriff being and remaining wholly unable to find out, or take, or arrest him the plaintiff under the said writ as aforesaid, the

defendant

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defendant, at the request of *George Stephen* the attorney of and for the said *Henry Cleeve* in that behalf, and in order to enable the said sheriff and *Philip Selby*, then being bailiff of the said sheriff in that behalf, and the same person as is named and described as Mr. *Selby* in the said supposed libels, to take and arrest the said plaintiff under and by virtue of the said writ, did, afterwards and within four calendar months from the date of the said writ, including the day of such date, to wit at the said several times when &c., print and publish &c., as he lawfully &c. Verification. Replication, de injuriâ, and issue thereon.

On the trial before Lord *Denman* C. J. at the *Middlesex* sittings after *Hilary* term last, a verdict was found for the plaintiff on the first issue, and for the defendant on the second.

Thesiger now moved (*a*) for a rule to shew cause why judgment should not be entered for the plaintiff, non obstante veredicto. The second plea shews no justification. On the trial, the defendant's counsel cited *Delany* v. *Jones* (*b*), which was an action for a libel contained in an advertisement, and where Lord *Ellenborough* is reported to have said, "That though that which is spoken or written may be injurious to the character of the party, yet if done *bonâ fide*, as with a view of investigating a fact, which the party making it is interested in, it is not libellous" (*c*). But the Lord

(*a*) Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

(*b*) 4 *Esp.* 191.

(*c*) The question in that case was, whether proof of the facts negatived the malice, as there was only a plea of not guilty. See the judgment of *Holroyd* J. in *Fairman* v. *Ives*, 5 *B.* & *Ald.* 645, 6.

1836.

LAY *against* LAWSON.

Chief Justice, on the trial of this cause, doubted the law laid down in that case; and said that he was not prepared to hold that *bona fides* was the only question, or that the right contended for existed, except for the purposes of public justice; and that, if that were so, every private transaction might be publicly inquired into by means of a newspaper.

Lord DENMAN C. J. I do not know that I meant to say that the right existed, even in the case of a public charge; nor do I know that that is necessary for Lord *Ellenborough*'s view. The libel in the case cited was inferential only. I have great doubt whether, there, the interest which the wife had in the inquiry could justify the offering a reward in a newspaper.

LITTLEDALE J. And this is a reward for the furtherance of a civil suit only.

The Court at first granted the rule; but afterwards (*April* 21.) the Court said that they felt doubtful whether it should be granted, intimating a distinction between justifying on account of the cause of publication, and justifying by averring the truth of all the facts stated: and in the same term (*May* 5.) his Lordship said that the Court thought the second plea contained a defence, and that, as the whole of it was proved, there must be no rule.

Rule refused.

1836.

ADDISON and JONES, Churchwardens, and RENDRICK and SPITTLE, Overseers, of the Parish of WEDNESBURY, *against* ROUND. *Wednesday, April* 20th.

TROVER for books containing the accounts, rates, assessments, and documents, concerning or belonging to the parish of *Wednesbury*. The particulars of demand, delivered under a judge's order, stated the action to be brought against the defendant as one of the late surveyors of the highways of the parish, to recover possession of one or more book or books, containing the rate or assessment for the repairs of the highways, and the names of the rate-payers in arrear, and the accounts as such surveyor, including the account of his colleague in office, for the year ending *Michaelmas* 1827. The like for the years ending, respectively, 1828, 1829, 1830, 1831. Pleas, first, not guilty; secondly, that the plaintiffs were not possessed as of their own property, &c. The plaintiffs joined issue on the first and second pleas. On the trial before *Alderson* B., at the last *Stafford* assizes, it appeared that the plaintiffs were the churchwardens and overseers for the year 1835–1836. The defendant was appointed surveyor of the highways in *Michaelmas* 1826, and held that office up to *Michaelmas* 1832, when he ceased to be surveyor. At that time he claimed a sum as due to him from the parish; and certain of the inhabitants personally guaranteed this sum; he thereupon agreed to give the books up; and the money was afterwards paid. In *January* 1833, the then churchwardens demanded the books of him; and, in

A surveyor of the highways, quitting office (before stat. 5 & 6 *W.* 4. c. 50.), claimed a sum as due to him from the parish; and, on the sum being guaranteed to him, agreed to deliver up his books. The sum was afterwards paid. In pursuance of a resolution of vestry, the books were demanded of him for the then churchwardens; and, in a subsequent year, they were also demanded by the churchwardens of the latter year: Held, that the churchwardens and overseers of the latter year were not entitled to maintain trover for the books; and, semble, that no parish officer of any year was so entitled.

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the same month, a vestry meeting was held, at which it was resolved that the books should be deposited in the hands of the churchwardens; and, in conformity with this resolution, the defendant was required, by the then surveyors, to deliver up the books, to be deposited in the hands of the churchwardens. Shortly after, the surveyors applied to a magistrate; but, as was alleged, circumstances put it out of their power to pursue this application. In *May*, of the same year, the surveyors served another demand upon the defendant, to the same effect as their former demand. In the same year a rule nisi was obtained for a mandamus to him to deliver up the books, which was afterwards made absolute; and he made a return which was held good by this Court, upon argument, in *Michaelmas* term last (see *Rex* v. *Round*, antè p. 139.). In *January* last, *Addison*, the present plaintiff, being then and now one of the churchwardens, and the surveyors, again demanded the books of the defendant. In the same month a vestry meeting was held, at which it was resolved that the present action should be brought; and the chairman, on that occasion, again demanded the books of the defendant. Some of the books had not been given up at the time when the action was brought. To shew a conversion, circumstances which took place at the times of the several demands were insisted upon; but the learned Judge was of opinion that no conversion was proved; and he was also of opinion that the present plaintiffs could not maintain the action. He therefore nonsuited the plaintiffs, giving them leave to move to have the nonsuit set aside, and a verdict entered for them, if the Court should be of opinion that there was evidence of a conversion,

conversion, and that the action was maintainable by the plaintiffs. The argument on the second point only is reported here.

Ludlow Serjt. now moved to enter a verdict. The right of the plaintiffs to maintain this action depends upon the question whether the parish have or have not a property in the books; for, if the parish have such a property, then the churchwardens and overseers have, as keepers of these chattels for the parish, at least a special property in them; and a right of property is sufficient, without actual possession. The stat. 13 *G.* 3. *c.* 78. *s.* 48. provides that, after the accounts of the surveyor leaving office have been allowed or disallowed, all the books and assessments "shall be transmitted to the churchwarden or overseer of the poor for such parish," &c., "or, if the place be extraparochial, then to some principal inhabitant thereof, to be kept for the use of such parish," &c. Then stat. 58 *G.* 3. *c.* 69. *s.* 6. enacts that all rates and assessments, accounts and vouchers, of the surveyors of the highways, "and other parish books, documents, writings and public papers of every parish, except the registry of marriages, baptisms, and burials, shall be kept by such person and persons, and deposited in such place and manner, as the inhabitants in vestry assembled shall direct; and if any person, in whose hands or custody any such book, rate, assessment, account, voucher, certificate, order, document, writing or paper shall be," "shall, after reasonable notice and demand, refuse or neglect to deliver the same to such person or persons, or to deposit the same in such place as shall by the order of any such vestry be directed, every person so offending, and being

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lawfully convicted thereof," "by and before two of his Majesty's justices of the peace, upon complaint thereof to them made, shall for every such offence forfeit and pay such sum, not exceeding" &c., "as shall by such justices be adjudged and determined." It is clear that the books, under the former act, ought to have been handed over to the churchwardens and overseers. [*Patteson* J. The act says, "to the churchwarden or overseer;" but you make the churchwardens and overseers all joint plaintiffs.] Where there is more than one churchwarden or overseer, delivery to one is delivery to all: all are therefore equally entitled to have the books delivered, for the use of the parish. Under both statutes, the books are clearly parish property: in parish accounts, the parish is always debited with the expense of the purchase of such books. The bells of the church, or the sacramental plate, would be described as the property of the parish officers in an indictment. [*Patteson* J. I doubt if they would be described as the property of the officers for years other than that to which the indictment related.] It is a continuing right; the change of officers can make no difference. It is true that no statute has yet gone so far as to make the churchwardens and overseers a corporation for this purpose. The rated parishioners are in the nature of cestui que trusts to the parish officers, who are trustees. [*Coleridge* J. In a case in the Exchequer (*a*), it was held that debt would not lie by a surveyor of the highways to recover composition money; and it was said that there was no contract.] The surveyor may, in the present case, be charged as a wrong doer. It is true that stat. 58 *G.* 3. *c.* 69. *s.* 6. gives another remedy; but a

(*a*) *Underhill* v. *Ellicombe*, *M'Lel. & Y.* 450.

proviso

proviso follows, "that every person who shall unlawfully retain in his custody, or shall refuse to deliver to any person or persons authorized to receive the same," "any book, rate, assessment, account, voucher, certificate, order, document, writing or paper belonging to any parish, or to the churchwardens, overseers of the poor, or surveyors of the highways thereof, may in every such case be proceeded against in any of his Majesty's Courts, civilly or criminally, in like manner as if this act had not been made." Here the circumstances prevented the summary proceeding.

Lord DENMAN C. J. The nonsuit appears to me to have been perfectly right. A plaintiff does not, by shewing that he has a right to obtain custody of a chattel, shew that he has a property which entitles him to maintain trover. The act of parliament directs that the books shall be given up as the vestry shall direct, to be kept for the use of the parish; and it gives the means of enforcing this by a penalty. It may be unfortunate that this remedy could not be adopted in the present case; but such remedy is all that the statute gives. Great inconvenience would follow from a different construction.

LITTLEDALE J. It seems to me that this nonsuit was correct. (His Lordship then read the sixth section of stat. 58 G. 3. c. 69.) I do not say that the remedy given by penalty may not be cumulative: but it appears to me that there is no special property in the parish officers till the books are delivered up. There was a duty incumbent on the surveyor: but no right of possession vested in the plaintiffs.

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PATTESON J. The legislature has not thought proper, so far as I can find, to vest the property of the books in the parish; it only directs who shall keep them. I do not even see how the parish officers of 1832 had the property, much less their successors. If we were to hold that this action would lie, we must hold that parish officers for any year may always sue for whatever their predecessors could have sued for. That was never so held. My brother *Ludlow* contends that a person, who has any right of custody of a chattel, may bring trover to obtain the chattel; so he may, after he has once obtained the custody: but this is an action of trover to obtain the custody.

COLERIDGE J. When a plaintiff in trover has no possession, he must have a general or a special property. Now I ask, what property have the present plaintiffs? My brother *Ludlow* says that the defendant is a wrong doer, and that the books are the property of the parish, because they ought to be given up for the use of the parish. He infers that the officers, for the year in which this ought to have been done, may sue; I doubt that: and he goes on to infer that their successors may therefore sue; for which I can see no authority. I would not dismiss any question too hastily; but we must be careful not to raise doubts upon elementary principles. We have always granted a mandamus to a surveyor, commanding him to deliver up his books: I never heard that such a mandamus was refused on the ground that an action of trover was maintainable.

Rule refused (*a*).

(*a*) Stat. 5 & 6 *W.* 4. *c.* 50. repeals (among other acts) stat. 13 *G.* 3. c. 78., but not stat. 58 *G.* 3. *c.* 69. The forty-first section vests the books,

books, &c., in the surveyor, or district surveyor, for the time being; and the forty-second section enacts, that the surveyor, district surveyor, or assistant surveyor, within fourteen days after leaving office, shall deliver the books, &c., to his successor in office, or retain them if he be continued surveyor or district surveyor; and, if he neglect so to deliver, shall forfeit for every offence any sum not exceeding 5*l.*, on conviction before two or more justices (*s.* 103).

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ADDISON *against* ROUND.

JONES *against* REYNOLDS.

Wednesday, April 20th.

ASSUMPSIT for use and occupation of land, and veins of ironstone, limestone, ore, and minerals, with the appurtenances. Pleas, the general issue, and statute of limitations. On the trial before *Coleridge* J. at the last Spring assizes for *Glamorganshire*, the plaintiff proved the following agreement, drawn up in the form of letters between the plaintiff and defendant: —

A. agreed with *B.* to take a lease of *B.*'s iron ore at *N.* for forty years, at a certain rent, engaging to work the several veins of ironstone, limestone, &c., in certain stipulated proportions; and *B.* agreed to grant such lease.

Held, that by this agreement *B.* took, not a mere license, but a right constituting an hereditament within stat. 11 *G.* 2. *c.* 19. *s.* 14., in respect of which *A.* might sue him for use and occupation.

"*Swansea*, 21st *February* 1825.

"Dear Sir,

"I shall be happy to take a lease of your iron ore at *Newton* at the royalty of 1*s.* per ton; and I will engage to work the several veins of ironstone, limestone, ore, and manganese in such relative proportions as that the average produce of iron shall not exceed the usual average of the common ores of *South Wales*, which I believe to be about 40 per cent.; the term to be forty years from the 24th of *June* next, and the sleeping rent 150*l.* per annum; the lease to be voidable on the part of the lessee by giving six months' notice, and paying one year's rent as a fine, if given within the first two years, and 500*l.* as a fine, if the lease be terminated by the lessee at any subsequent time; the relative proportions of the iron ores in weight, to be worked

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worked together, to be ascertained by a competent person. I am," &c. "*J. Reynolds.*

"To *Calvert Richard Jones*, Esquire."

"I agree to the terms contained in your letter, copied on the other side, and shall be ready to grant a lease conformable thereto from myself and all other proper parties whenever you require me.

"*Calvert Richard Jones.*

"*John Reynolds*, Esquire."

The plaintiff also put in the following notes, written upon the respective parts of the former agreement by the plaintiff and defendant: —

"Memorandum, 4th *April.* — I propose to take a lease of the minerals above described, lying in the lands of which you are joint proprietor with Colonel *Knight*, on the terms above mentioned for your exclusive property.

"*John Reynolds.*"

"I agree to let to Mr. *Reynolds* a lease of my joint property on the same terms I have granted him a lease of my independent property, commencing at the same time, and paying the same sleeping rent, and the same royalty per ton.

"*C. R. Jones.*"

Evidence was then given to shew an actual use and occupation. *Coleridge* J. expressed a doubt whether the interest vested in the defendant, by these agreements, was of such a nature that an action of use and occupation could be grounded upon it; and he referred to *Doe dem. Hanley* v. *Wood* (*a*). Leave was given to

(*a*) 2 *B.* & *Ald.* 724.

move

move to enter a nonsuit on this point, and the plaintiff had a verdict. 1836.

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John Evans, in this term, moved accordingly (*a*). Nothing was granted, by this agreement, that could be the subject of an action for use and occupation. The defendant had merely a licence to take minerals, not a grant of the subsoil. He could not have maintained ejectment; *Doe dem. Hanley* v. *Wood* (*b*). As was observed there (*c*), the agreement, instead of granting all the ores, metals, or minerals that were then existing within the land, grants only such parts of them as should be found within the limits, upon exercise of the power given by the agreement to search for and get the ore: the grantee had no estate or property in the land itself, or in any part of the ore ungot. "That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it." It makes no difference whether the chattel be in the land or upon it: if the grant had been of 500 tons of paving stones lying on the land, no action for use and occupation would have lain for either the close or the stones. This is the same case. [Lord *Denman* C. J. The action is given by stat. 11 G. 2. *c.* 19. *s.* 14. in respect of "lands, tenements, or hereditaments."] The right in question comes within none of those terms. It is merely a right to go upon land and fetch away a personal chattel. [Lord

(*a*) *April* 16th. Before Lord *Denman* C. J., *Patteson* and *Coleridge* Js. He also moved for a new trial, on the ground that the evidence of use and occupation was insufficient, and on account of misdirection; but it is unnecessary to notice these points further.

(*b*) 2 *B.* & *Ald.* 724. (*c*) pp. 738, 9.

Denman

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Denman C. J. The agreement here is expressly to grant a lease.] The lease, if granted, would have been only equivalent to the licence in *Doe dem. Hanley* v. *Wood* (*a*). The defendant would have only so much of the ore as he could work out, the rest remaining the property of the grantor. [*Patteson* J. The same might be said as to the lease of an open mine.] Ejectment lies for an open mine; but that has buildings and other works, which may properly be the subject of such an action (*b*). Here nothing of that kind was granted. [Lord *Denman* C. J. The defendant must have had the occupation of some land for the purposes of this grant.] The same argument might have been used in *Doe dem. Hanley* v. *Wood* (*a*). [*Patteson* J. The landlord here is in the situation of the owner of a mine granting the whole pit. He excludes himself.]

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. The first point raised on the motion for a new trial was, whether the right to take minerals can be the subject matter of use and occupation. If it may, having been expressly demised, though not by deed, the action is maintainable within the statute 11 *G.* 2. *c.* 19. The doubt which occurred to my brother *Colcridge* on the trial arose from *Doe. dem. Hanley* v. *Wood* (*c*), where this Court thought ejectment would not lie for the premises there sued for, relying on various reasons for that opinion. One of these was, that the terms of the indenture did not amount to a

(*a*) 2 *B.* & *Ald.* 724.

(*b*) See *Doe dem. Earl of Falmouth* v. *Alderson*, 1 *M.* & *W.* 210. *S. C. Tyrwh.* & *Gr.* 543.

(*c*) 2 *B.* & *Ald.* 724.

grant

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JONES *against* REYNOLDS.

grant of anything for which ejectment lies, but merely to a permission to search and dig for ore. But it does not seem to follow that that permission actually demised and actually exercised would not be a hereditament enjoyed by the lessee; a hereditament being (in Lord *Coke*'s well known words, *Co. Litt.* 6 *a.*) "whatsoever may be inherited," "be it corporeal or incorporeal, real, or personal, or mixed;" and the statute gives this form of action for every hereditament enjoyed.

The evidence of use and occupation appears to us not only sufficient, but unusually strong (*a*).

Rule refused.

(*a*) The judgment on the other parts of the case is omitted.

DOE on the several Demises of HURST, PARTINGTON, and ORCHARD, *against* CLIFTON (*a*).

Wednesday, April 20th.

EJECTMENT for premises in *Hertfordshire*. The action was originally brought on the several demises of *Hurst*, *Partington*, *Orchard*, *Thomas Neatby Stubbs*, and *Thomas Stubbs*. In *Trinity* term 1835, *Platt*

Ejectment was brought against tenant in possession on the several demises of *A.* and *B.* Application was made to strike out *B.*'s name, on affidavit that the tenant claimed under *B.*, that the action was defended to protect *B.*'s interest against *A.*, and that *A.* claimed under a conveyance from *B.*, which was asserted to be invalid by reason of fraud.

The Court granted the application, though *B.*, who was in the *East Indies*, had not expressly authorised it, grounds being shewn for inferring a general authority, in the party making the application, to act for *B.*'s interest with respect to the premises.

And this, although it was sworn, in opposition to the application, that the conveyance from *B.* to *A.* was bonâ fide and for good consideration, that *B.* had covenanted for further assurances to *A.*, that the insertion of the name of *B.* was necessary to give legal effect to the conveyance, and that *A.* was in circumstances enabling him to defray the expenses of the proceedings, and to indemnify *B.*

(*a*) There was another cause, *Doe*, on the same demises, against *Richard Stubbs*, which, as to all the points here noticed, turned upon nearly the same facts, and received the same decision, as *Doe* v. *Clifton*.

obtained

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Doe dem. Hurst against Clifton.

obtained a rule calling on the three lessors of the plaintiff first named, and the plaintiff's attorney on the record, to shew cause why the names of *Thomas Neatby Stubbs* and *Thomas Stubbs* should not be struck out of the declaration, and why the plaintiff's attorney should not pay the costs of the application. *Thomas Stubbs* made affidavit that he had not authorised any person to use his name, that it was used against his will, and that he claimed no title to or interest in the premises (*a*). The attorney of *Clifton*, and of *Richard Stubbs* (*b*), who was the tenant in possession of part of the premises, made affidavit that the property had been devised to *Catherine Neatby* for life, remainder to trustees for *Ann Stubbs* the wife of *Richard Stubbs* for life, remainder to *Thomas Neatby Stubbs* in fee; remainder over, if *T. N. Stubbs* should, at the time of the death of *Catherine Neatby* or *Ann Stubbs*, be dead without having left any child or children of his body lawfully begotten then living; that *Thomas Neatby Stubbs* survived both *Catherine Neatby* and *Ann Stubbs*, and was now in the *East Indies*; that the deponent believed that *Hurst* and *Partington* claimed title under deeds or instruments obtained from *T. N. Stubbs* under circumstances which the deponent was advised and believed rendered them invalid for fraud: that previous ejectments had been brought against *Clifton*, *Richard Stubbs* and others, as tenants in possession, for the same premises, on the demises of *Hurst* and *Partington* only, which had failed, except as to some copyhold premises as to which a verdict had been found for

(*a*) Nothing appeared in the affidavits on either side, shewing any interest in *T. Stubbs*, besides the circumstance of his joining in the conveyance.

(*b*) See page 809. note (*a*), ante.

the

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Dox dem. HURST *against* CLIFTON.

the plaintiff, subject to a question of law still pending; that in those actions the deponent acted nominally as attorney for the defendants, who claimed under *Thomas Neatby Stubbs*, but really for and at the instance and under the instruction of *T. N. Stubbs*, and for the protection of his interest against *Hurst* and *Partington*; that *T. N. Stubbs* continued, in his correspondence with the deponent, to express his anxiety on the subject, and had desired him to take measures for the security of the title deeds; and that the deponent believed that the name of *T. N. Stubbs* was used without his authority or knowledge, and against his will.

In opposition to the rule, *Partington* made affidavit that *T. N. Stubbs* and *T. Stubbs* had conveyed part of the premises to him bonâ fide, and for a valuable consideration; that he was informed and believed that the insertion of their names was necessary to give legal effect to the conveyance; and that he was able to bear the expenses of the ejectment or any proceedings incident thereto, and to indemnify *T. N. Stubbs* and *T. Stubbs* if he should be called on so to do. The plaintiff's attorney also made affidavit that, since the deaths of the devisors and of *Catherine Neatby* and *Ann Stubbs*, *T. Stubbs* and *T. N. Stubbs* had by deed bargained, sold, and assigned to *Partington* in fee, all their estate, right, title, interest, reversion, use, trust, property, claim, and demand whatsoever, both in law and equity, in a part of the premises, declaring therein that they had done no act to incumber the estate, and that *T. N. Stubbs* therein covenanted for reasonable further assurances, at his own expense, by himself and *T. Stubbs*, for and to the use of *Partington* in fee.

Petersdorff,

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Doe dem. HURST against CLIFTON.

Petersdorff, in *Trinity* term, 1835, shewed cause. *Partington* could not obtain leave from *Thomas Neatby Stubbs* to use his name, on account of his absence; but he claims under a conveyance from him and *Thomas Stubbs*. There may be some doubt whether the conveyance be legally complete; and it is just that the party taking it should be allowed to use the name of the parties conveying, for the purpose of getting rid of the difficulty of proof; and such a practice is very common. Even admitting that, where the parties, whose names are so used, themselves take the objection, this may be sufficient ground for the Court acceding to it, here *Thomas Neatby Stubbs* does not come into Court; the objection is taken by the attorney of a defendant in ejectment as the tenant in possession. In *Adams on Ejectment*, it is said, p. 211. (*a*), that, "where demises are inserted in the names of any parties without their authority, the Court on motion will order such demises to be struck out of the declaration, *unless the justice of the case requires their insertion, and a sufficient indemnity is given.*" Here the justice of the case, and the sufficiency of the parties to indemnify, appear on the affidavits.

Platt contrà. This is an attempt to get rid of the question whether the conveyance was fraudulent, through which *Partington* claims. If the conveyance be not fraudulent, *Partington*'s demise was sufficient. [*Patteson* J. Has there been any instance of this Court retaining names on the demise, on an indemnity, the parties being merely trustees?] No such instance can be found. [*Patteson* J. There might be a defect in the convey-

(*a*) 3d edit. (1830).

ance,

ance, owing to an outstanding term.] Nothing of this kind is pretended. 1836.

Per Curiam (*a*). This rule must be made absolute.

Rule absolute without costs.

Doe dem. HURST *against* CLIFTON.

In ejectment by a mortgagee, a defendant, not being the mortgagor, but in reality defending for his benefit, cannot set up a prior mortgage executed by him.

The cause was tried before *Tindal* C. J., at the last Spring assizes at *Hertford*. The lessor of the plaintiff, *Orchard*, proved a mortgage to him by *Thomas Neatby Stubbs*, in 1824, of his reversionary interest in the premises, expectant on the lives of *Catherine Neatby* and *Ann Stubbs*. The defendant produced a mortgage of the same premises to a different party, executed by *T. N. Stubbs* in 1822. For the plaintiff it was contended that *T. N. Stubbs* himself could not have been permitted to set up this prior mortgage against his own deed, and therefore that *Clifton*, who, as the plaintiff alleged, held possession as tenant to *T. N. Stubbs*, was, in like manner, precluded. The relation of *Clifton*, as tenant, to *T. N. Stubbs*, was disputed; but it was further urged, and appeared from the evidence, that the action was, in reality, defended for the benefit of *T. N. Stubbs*; and the Lord Chief Justice, considering that to be so, held that the mortgage of 1822 could not be set up. A verdict was therefore taken for the plaintiff on *Orchard*'s demise, and for the defendant on the others. *Platt*, in the present term (*b*), moved, by leave reserved, for a rule to shew cause why a nonsuit should not be entered; contending that the defendant was not shewn to be tenant to *T. N. Stubbs*, and was not otherwise identified with him. And now

(*a*) Lord *Denman* C. J., *Littledale*, *Patteson*, and *Williams* Js.

(*b*) *April* 16th. Before Lord *Denman* C. J., *Patteson* and *Coleridge* Js.

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Doe dem. HURST against CLIFTON.

The Court (having taken time to confer with *Tindal* C. J.) said that the defendant appeared, by the evidence, to be merely a nominal one for the benefit of *T. N. Stubbs*, the mortgagor in the deed under which the lessor of the plaintiff, *Orchard*, claimed; and that, as it was not competent to *T. N. Stubbs* to derogate from his own mortgage by shewing a prior deed, so neither could the defendant for his benefit (*a*). And the rule was refused.

A mortgagor, in order to entitle himself to the benefit, in a court of law, of stat. 7 *G.* 2. *c.* 20. s. 1. (directing a re-conveyance by the mortgagee, plaintiff in ejectment, upon payment of principal, interest, and costs), must become a defendant in the action of ejectment.

Where he is not such defendant, the Court will not interfere, either under the statute, or in the exercise of its general power over actions in the Court.

Although the ejectment has been brought against the tenant of the mortgagor, and the Judge, at the time of the trial, treated the defendant as such tenant, and decided upon the evidence accordingly.

On a subsequent day of this term (*April* 21st), *Platt* obtained a rule to shew cause why it should not be referred to the Master to ascertain what was due for principal and interest, on the mortgage deed of 1824, and to tax the costs of the lessors of the plaintiff, and why *Orchard* should not accept the amount of such principal, interest, and costs in discharge of the mortgage, and execute a reconveyance to *T. N. Stubbs*, and deliver up all deeds, &c., or why, in case of *Orchard*'s refusal so to do, the money should not be paid into Court to abide the further order of the Court; and why proceedings should not be stayed in the meantime. The affidavits in support of the rule stated the circumstances of the above-mentioned trial; that *T. N. Stubbs* was, and had for several years been, in *India;* that he was the party who had a right to redeem the mortgage; that no suit in equity was pending to foreclose or redeem; and that judgment was not signed in either cause. The attorney who gave instructions for this application made affidavit that he was duly authorized to act for *T. N. Stubbs* in

(*a*) See *Doe dem. Ogle* v. *Vickers*, antè, p. 782.

this

this behalf. In *Trinity* term following, *June* 11th, 1836,

1836.

Doe dem. Hurst against Clifton.

Kelly and *Petersdorff* shewed cause. This is an application under stat. 7 *G.* 2. *c.* 20. *s.* 1.; but that statute applies only where the person having right to redeem "shall appear and become defendant" in the action of ejectment.

Platt, contrà. The intention of the act was that the mortgagee should obtain only principal, interest, and costs, but not the land itself. This intention will be defeated if such an objection prevail; and especially as the mortgagor was identified with the defendant at the trial. The case is clearly within the equity of the statute. The application is on behalf of the mortgagor. At all events, the Court may suspend the proceedings, by its general power.

Lord DENMAN C. J. We might, perhaps, wish that we had the power which the applicant contends that we have; but we have none such, directly or indirectly. The applicant does not answer the requisite which the statute makes essential, and for which there are good reasons. If we have not the direct power, under the statute, neither can we exercise such a power indirectly, for the sake of doing justice in a particular case.

LITTLEDALE J. It is reasonable enough that the applicant should be relieved upon payment of principal, interest, and costs: but the question is whether this Court has the power to give such relief. The courts, for many years, have endeavoured to save expense in

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Doe dem. Hurst *against* Clifton.

proceedings arising from mortgages; but, in the case of ejectment, their power is defined by statute. One condition is, that the mortgagor should make himself defendant: that is a preliminary without which this Court has no jurisdiction, any more than it would have to relieve against a forfeiture for non-payment of rent.

Patteson J. The words of the statute are, "and who shall appear and become defendant or defendants in such action." This applicant has not become a defendant. I do not see how we could exercise any equitable jurisdiction here, without utterly disregarding the statute (*a*).

Rule discharged (*b*).

(*a*) *Williams* J. was absent.

(*b*) See *Doe dem. Tubb* v. *Roe*, 4 *Taunt.* 887.

Thursday, April 21st.

Doe on the several Demises of Danson and Others *against* Parke.

A., being tenant in fee simple of customary land which passed by bargain and sale with surrender and admittance, became bankrupt, and the commissioners assigned the land to the assignees.

Ejectment for messuages and lands in *Cumberland*. There were six demises. The three first were laid on the 10th of *June* 1826, and were, first, by *John Danson;* secondly, by *William Blendall, Thomas Bowes*, and *Richard Mellon*; thirdly by *Blendall* and *Mellon*, only. The other three demises were by *John Danson*, by *Blendall, Bowes*, and *Mellon*, and by *Blendall* and *Mellon*, and were laid on the 10th of *March* 1832.

Afterwards the bankrupt died; and, after that, the assignees were admitted.

Ejectment being brought, on the demises of the bankrupt's heir-at-law, and of the assignees, both laid between the bankrupt's death and the admission, Held, that the plaintiff must recover on one or the other demise; for that the title was not in abeyance; but, if the assignees' title was not perfect, it was in the heir.

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Doe dem. DANSON against PARKE.

On the trial before *Parke* B. at the last *Carlisle* assizes, it appeared that the premises were customary freehold, and that, by the custom, they passed by deed of bargain and sale presented and enrolled at the manor house with surrender and admittance. *John Danson* was in possession in 1790; and his admission in that year was produced. It was further proved, on the part of the plaintiff, that *John Danson* continued in possession up to the 27th of *February* 1821, on which day a commission of bankruptcy issued against him, and *Blendall*, *Bowes*, and *Mellon* were appointed assignees. By bargain and sale of the 10th of *April* 1821, duly enrolled in Chancery, the premises were assigned to them by the commissioners. The defendant claimed through a party who came into possession at a later period in 1821, under an equitable mortgage; but no evidence was offered of the title of such party. The said *John Danson* died in 1830, leaving his son, *John Danson*, his heir-at-law; and *Bowes* died between *April* 1832 and *April* 1833. On the 3d of *July* 1835, *Blendall* and *Mellon* were admitted, and the admission was signed by the lord of the manor. On this evidence, the learned judge directed a verdict for the plaintiff, on the demise of *John Danson* in 1832.

W. H. Watson now moved (*a*) for a rule to shew cause why the verdict should not be set aside, and a new trial be had for misdirection. The proof given on the part of the plaintiff shewed that the title was not perfected in the assignees; for the assignment passes nothing without surrender and admittance; and, even

(*a*) Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

1836.

Doe dem. Dawson against Parke.

supposing the admittance in 1835 to be evidence of a surrender assented to by the lord, it did not prove a surrender before the day of the latest demise, the 10th of *March* 1832. It has never been decided that a surrender and admittance have relation back to the bargain and sale, in the case of customary freeholds; though that is the case as to copyholds (*a*). "Customaryhold" is first mentioned in the bankrupt act 6 *G.* 4. *c.* 16. *ss.* 64, 68, &c. On this ground the learned Judge directed the verdict to be taken upon the demise of the heir-at-law. But the assignment devested the title of the bankrupt and his heir; and the plaintiff producing the proceedings in bankruptcy could not dispute their effect. And, indeed, the provison of stat. 49 *G.* 3. *c.* 121. *ss.* 10. seems to apply. [*Littledale* J. You say the title was in a sort of neutral state.] It was so: either as an inchoate title in the commissioners, or as an anomalous instance of a title in abeyance, under the peculiar operation of the bankrupt laws. [Lord *Denman* C. J. A party who has a possession of twenty years has a title against any one coming in after, unless the latter shews title (*b*). The question is, as to the effect of what has been done under the bankruptcy.]

Cur. adv. vult.

Afterwards in this term (*May* 5th) Lord *Denman* C. J. delivered the judgment of the Court.

We do not consider that the defendant can raise any question on stat. 49 *G.* 3. *c.* 121. *s.* 10. The plaintiff must recover in one way or the other. Either the bankrupt had not parted with the land, and then the

(*a*) See *Parker* v. *Bleeke*, *Cro. Car.* 568.

(*b*) See *Doe dem. Smith* v. *Webber*, 1 *A.* & *E.* 119.

plaintiff

plaintiff must recover on the demise of the heir-at-law; or he had parted with it, and then the title of the assignees is good.

Rule refused.

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Doe dem. DANSON *against* PARKE.

ATKINS and Another *against* OWEN.

Thursday, April 21st.

If a party receiving a bill payable to order, for the purpose of getting it indorsed for another person, procures the indorsement, pays in the bill to his own account at his banker's, with intent to appropriate the proceeds, and, before the bill is due, draws upon such account (though not specifically upon the credit of the bill), and his draft is honoured, an action of trover may be commenced against him before the bill is due, but not an action for money had and received.

ASSUMPSIT for money had and received. Plea, general issue. The plaintiffs having been nonsuited by reason of their not producing in evidence a bill alleged to have been misapplied by the defendant, the Court, on motion for a new trial, in *Michaelmas* term 1834, held the nonsuit right, but granted a rule nisi for a new trial, on affidavits (*a*). The rule was made absolute in last *Hilary* term, *January* 18th (*b*); and the

(*a*) *Atkins* v. *Owen*, 2 *A.* & *E.* 35.

(*b*) The motion was made on an affidavit by the plaintiff's attorney, that, as soon as he found that the action was likely to come on, he commenced inquiries to ascertain in whose hands the bill was, and that, upon discovering this, he immediately made efforts to obtain it, through a person who promised to procure it; that deponent obtained it, but too late for the trial, and that he had it now in his possession.

Plaintiff having been nonsuited for not producing a document on the trial, the Court set aside the nonsuit, on payment of costs, upon the affidavit only of the plaintiff's attorney, that he, the attorney, "as soon as he found that the action was likely to come on," had commenced inquiries to ascertain in whose hands the document was, and, upon discovering this, had immediately (through a person who promised to procure it) made efforts to obtain it, but had obtained it too late for the trial, and now had it.

Barstow shewed cause. The plaintiff's attorney might have withdrawn the record; and, as the matter now stands, there is not a verdict against the plaintiff, but only a nonsuit. There is no precedent for setting a nonsuit aside under such circumstances. [Lord *Denman* C. J. Is there any precedent for refusing?] In *Shillito* v. *Theed*, 6 *Bing.* 753., a nonsuit was set aside on payment of costs, upon the ground of the absence of a material witness; but the witness had been subpœnaed. Here no inquiries were commenced till the plaintiff's attorney found the

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cause was again tried at the last *Exeter* assizes, before *Littledale* J. On this trial, it appeared that a bill of exchange for 100*l.* had been remitted to the plaintiffs in discharge of a debt due to them from *Studdy*; that the bill (now given in evidence) was payable to the order of *Studdy*, sixty days after sight; that the plaintiffs handed the bill to the defendant, in order that he might get it indorsed for them by *Studdy*; and that the defendant got it so indorsed, paid it to his own account at his bankers' (indorsed to them), and claimed a right to retain the proceeds. It also appeared that the bankers had placed the bill, in the usual way, to the defendant's credit; and that the defendant, after paying in the bill, had drawn upon his account at the bankers', though not specifically on the credit of this bill. He had frequently been allowed to overdraw his account at the bankers', and it was overdrawn when this bill was paid. They charged interest upon it, by reason of the amount having been advanced before it became due. The bill when paid in was not accepted; the bankers in due course forwarded it for acceptance and for payment. It

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the trial was likely to come on. It is not said that there was any application to the defendant. No dates are given in the affidavit. The plaintiff's attorney must be taken to have known, throughout, the necessity of producing the bill. [Lord *Denman* C. J. It was a very strict application of the rule.] No breach of faith is imputed to the defendants. At least it should be made a condition of the rule that, if the defendant choose to pay the money, the plaintiff shall pay the costs of the former trial.

Sir *W. W. Follett*, contrà, was stopped by the Court.

Lord DENMAN C. J. There is no danger here of our setting a bad precedent. The rule must be made absolute, on payment of costs.

LITTLEDALE and WILLIAMS Js. concurred. (COLERIDGE J. was absent).

Rule absolute on payment of costs.

remained

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remained in their books to the defendant's credit, all the time it was running. The action was commenced before the bill became due, and the learned Judge, on that account, directed a nonsuit, giving leave to move to enter a verdict for the plaintiffs.

Crowder now moved accordingly. Trover would clearly have lain; and the defendant is liable, under the circumstances, in an action for money had and received, though the bill, not being due, had not actually been turned into money when this action was commenced. It passed as money in the account on which the defendant drew, and that is sufficient. In *Reed* v. *James* (*a*), where a creditor issued execution against his debtor's goods, and took a bill of sale of them from the sheriff, it was held that the assignees of the debtor (who had committed acts of bankruptcy before the execution) might sue the execution creditor for money had and received, though the goods had not in fact been turned into money. Here, if the defendant had got the bill discounted, there could be no doubt as to the form of action; and he might have done so. It would not lie in his mouth, in such a case, to say that the bill was not yet due, when he could not deny that he had received the money on it. The same would be the case if he had pledged the bill. It has in fact been turned into money, since it has gone to the credit side of his account. When a party, having bills in the hands of his banker, draws generally upon his account, each bill is in fact drawn upon. If an insurance broker adjusts a loss upon a policy, and the underwriter gives him

(*a*) 1 *Stark. N. P. C.* 134.

credit

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credit in account, or a bill, for the amount, the assured may recover against such broker for money had and received, although no money may have come to his hands; *Andrew* v. *Robinson* (*a*), *Wilkinson* v. *Clay* (*b*). [*Patteson* J. In such cases, by the course of dealing, the broker must be taken to have admitted the receipt of money (*c*); if the underwriter fails, it is not open to the broker to defend himself by saying that money has not passed: that is the ground of decision.) The like ground exists here.

Lord DENMAN C. J. The defendant's conduct appears to have been such, that I should have been happy if we could have granted this rule; but if it is evident that the action does not lie, it would be a waste of time to do so. Trover would clearly have lain; but a different form has been adopted; and, viewing the case as if, at the present moment, a bill not yet due were taken by the defendant and handed to his banker, what money is had and received to the use of the plaintiff? The defendant receives credit in his bankers' books on the expectation that the bill will be paid. If it is not paid, and he is held liable in this action, he may have to repay the amount twice over, being liable also to the banker. His being a wrong-doer cannot vary this view of the case.

LITTLEDALE J. concurred.

PATTESON J. I am of the same opinion. This is a case, not of money had and received to the use of the

(*a*) 3 *Camp.* 199. (*b*) 6 *Taunt.* 110.

(*c*) See *Scott* v. *Irving*, 1 *B. & Ad.* 605. and the cases there cited.

plaintiff,

plaintiff, but money lent by the banker to the defendant. The case is as my Lord has put it.

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ATKINS *against* OWEN.

COLERIDGE J. concurred.

Rule refused.

JEFFERY *against* EDMUND POLLEXFEN BASTARD, Esquire.

Thursday, April 21st.

CASE against the late sheriff of *Devon*, for taking insufficient sureties, *Thomas Hallett* and *William Bellworthy*, in a replevin bond. The distress was stated to have been of great value, to wit 1000*l.*, and to have been taken for arrears of rent, to wit 75*l.*; and it was alleged that the now plaintiff recovered in the replevin suit 75*l.* arrears of rent, and 159*l.* costs; and that, by the sheriff's default, the now plaintiff lost the benefit of the distress, and failed to recover his costs, &c. First plea, that, before the taking of *T. H.* and *W. B.* as such sureties, to wit, on &c., the defendant, as such sheriff &c., "instituted and made a due, and proper,

In taking sureties in a replevin bond, the sheriff is to exercise a reasonable discretion in deciding upon their sufficiency; and, in an action for taking insufficient sureties, it is for the jury to decide whether he has used such discretion or not.

The sheriff or replevin clerk is not bound to go out of the office to make inquiries; but, if the sureties are unknown to him, he ought to require information, beyond their own statement, as to their sufficiency.

Where persons of respectable appearance are brought to the replevin clerk as sureties by the attorney's clerk on behalf of the party replevying, their circumstances being unknown both to the attorney's clerk and to the replevin clerk, and the latter causes the sureties to make affidavit in detail as to their sufficiency, with which he is satisfied, and an action is afterwards brought against the sheriff for taking insufficient sureties, the jury may properly find that the inquiry made does not excuse the sheriff.

On the trial of such an action, the bond, but not its amount, being admitted on the pleadings, evidence was gone into on both sides, upon the question whether or not, under the circumstances above stated, the replevin clerk had used reasonable caution. The replevin bond was referred to by both parties during the trial, and was stated to have been taken in double the value of the goods; and it was in court, ready to be produced; but, by an oversight, the plaintiff did not formally put it in, nor was it expressly noticed as a part of the evidence in the cause, till a verdict had been given for the plaintiff. The Judge stating to the Court that he considered it as in effect put in: Held, on motion to enter a verdict for nominal damages for want of proof of the bond, or other evidence of the value of the goods, that the bond must be considered as having been in effect proved at the trial.

In an action against the sheriff for taking insufficient sureties in a replevin bond, the penalty of the bond is the limit of damages.

and

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and reasonable inquiry into the circumstances, estate, substance and condition" of *T. H.* and *W. B.*, in order to ascertain whether they and each of them was and were a good and sufficient surety and sureties; and that, upon such inquiry, and at the time of their becoming sureties, each of them "appeared to the defendant, as such sheriff as aforesaid, to be, and at that time ostensibly was, a good, able, sufficient and responsible pledge and surety," &c. Verification. Second plea, that *T. H.* was a good surety. Verification. The replication traversed the above statements in the two pleas respectively, and tendered issue to the country. Joinder. On the trial before *Littledale* J., at the last Spring assizes at *Exeter*, evidence was given for the plaintiff, to shew the condition in life of the sureties; and the defendant then proved that, on *October* 24th, the day before the time for replevying expired, the clerk of the attorney for *Leatt*, the party replevying, came to the office of *Drake*, the defendant's replevin clerk at *Exeter* (who now gave evidence for the defendant), and tendered the two sureties. *Drake* questioned them at first separately, and afterwards together, as to their property, and took down the answers. They had the appearance of small farmers. *Drake* did not know them; nor did it appear that the attorney's clerk had any personal knowledge of them. The examination lasted half an hour. *Drake* finally took affidavits from the sureties, which were as follows:—

"*Thomas Hallett*, of *Ottery St. Mary* (*a*), in the county of *Devon*, yeoman, maketh oath and saith that he resides in the parish of *O. St. M.* in the said county,

(*a*) About thirteen miles from *Exeter*.

on

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on a leasehold property held under Sir *John Kennaway* Bart. for a term of ninety-nine years determinable on three lives. That the said lease was granted to him by the said Sir *J. K.*, and this deponent has farmed the property ever since, and is now in the possession and enjoyment thereof. That there is a dwelling house upon it, in which this deponent and his family reside, and the furniture therein is his own property; and this deponent further saith that there is no mortgage or charge on the said property or furniture, and that he is the sole and exclusive possessor thereof. And this deponent further saith that, under the will of his late uncle *Henry Pooke*, he is entitled to the sum of 100*l.* payable on the death of his mother, now aged seventy-three, and that the trustee under the said will is *George Barne* Esquire, of *Tiverton* in the said county: and this deponent further saith that he is worth, over and above what debts he owes, the clear sum of 160*l.* and upwards.

"And this deponent, *William Bellworthy* of *Rockbeare* (*a*) in the said county, yeoman, maketh oath that he is a housekeeper in the parish of *R.* aforesaid; that he is the owner of the fee-simple of a cottage, formerly two cottages, in *R.* aforesaid, and an orchard or garden thereto belonging, now occupied by *Francis Marker* at the annual rent of 5*l.* 5*s.*; that there is no mortgage or charge on the said property; and this deponent is the sole and exclusive possessor thereof: and this deponent lastly saith that he is worth, after all his debts are paid, the clear sum of 160*l.*"

Drake stated at the trial that this was the course he

(*a*) About six miles from *Exeter*.

always

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always took in such cases: that he required the affidavits because he knew nothing of the parties: and that, at the time, he was quite satisfied in his judgment that they were responsible people. He also stated that the replevin bond was taken in double the value of the goods. The learned Judge expressed his opinion that this examination was not sufficient, and that inquiry ought to have been made on behalf of the sheriff among persons who had means of knowing the sureties. No witness acquainted with the circumstances of *Hallett* and *Bellworthy* was called for the defence. The plaintiff had a verdict for 160*l.*

Crowder now moved for a rule to shew cause why there should not be a new trial on the ground of misdirection; or why the damages should not be reduced to nominal ones, on the ground after mentioned. The inquiry was sufficient under the circumstances. The sureties were presented by the clerk of an attorney known in the town; and the replevin clerk was not bound to enter upon an investigation at two distant places before granting the replevin. The affidavits are available as shewing the minute inquiry to which the parties had been subjected. The statements in them are very precise, and mention the names of known individua s, whom the parties would not refer to falsely upon oath. [Lord *Denman* C. J. These are mere voluntary affidavits.] In *Hindle* v. *Blades* (*a*) it was held that the sheriff was not bound to warrant the sufficiency of the sureties: *Saunders* v. *Darling* (*b*) was there cited, where it is said that slight evidence of in-

(*a*) *5 Taunt.* 225. 1 *Marsh.* 27. (*b*) *Bull. N. P.* 60.

sufficiency

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JEFFERY against BASTARD.

sufficiency is enough to throw the onus of proof on the sheriff, "for the sureties are known to him, and he is to take care that they are sufficient." But *Mansfield* C. J. said, "I cannot think the statute (*a*) meant to throw on the sheriff this *onus:*" and *Heath* J. observed, — "The mischief, before the statute, was, that the sheriff used to accept mere men of straw for sureties. But the sheriff cannot cast up the man's accounts to see the real state of his property." [Lord *Denman* C. J. There a primâ facie case of respectability appeared. *Littledale* J. In this case the replevin clerk said that he took affidavits because he knew nothing of the parties.] They appeared to be small farmers and respectable persons. [*Coleridge* J. How could the credit and apparent respectability of the parties be ascertained by examining themselves? If the attorney's clerk had known any thing of them, he might have been questioned; but they appear to have been strangers to him.] It would have been seen on the examination of the parties whether they prevaricated, or were unable to answer any particular inquiry. The mere addition of the attorney's clerk, or some other vouchee, who might or might not be known at the sheriff's office, would not much advance the case. The replevin clerk is not bound to go out of the office to make inquiries; and it was for the jury to say whether a reasonable discretion had been exercised in the inquiry made there. The learned Judge led them to suppose that, in point of law, the inquiry proved was insufficient. The case would be different if the sheriff had, within his office, means of knowing that the surety was insufficient; as

(*a*) 11 *G.* 2. *c.* 19. *s.* 23.

in

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JEFFERY against BASTARD.

in *Scott* v. *Waithman* (*a*), where writs against one of the sureties had passed through the sheriff's hands. *Abbott* C. J. there said that if the sheriff, "having the means within his power of informing himself," neglected to use them, he was responsible. That must signify means within his reach as sheriff, within his office: otherwise the qualification seems unnecessary; for the sheriff, like any other man, would of course have means within his power of inquiring at a distant place. *Sutton* v. *Waite* (*b*) also shews that the duty of the sheriff is not such as the plaintiff here would represent it; and *Park* J. there relies upon the expressions of *Heath* J. in *Hindle* v. *Blades* (*c*).

But further, the damages ought to be reduced. The value of the goods replevied was not proved. It was said to be admitted by the plea; but the declaration only lays it under a videlicet, at 1000*l*. A witness stated that the bond was taken in double the value of the goods; but the bond itself was not given in evidence, nor particularly adverted to till after the verdict. It was a mistake, but fatal to the plaintiff's right to recover any but nominal damages. [*Littledale* J. The bond lay on the table of the Court. I considered it as being substantially put in.]

Elliott, for the plaintiff, made a cross motion to increase the damages, contending that the amount of damage alleged in the declaration to have accrued by the sheriff's default was admitted by the plea; and that, as against the sheriff, the right to recover was not

(*a*) 3 *Stark. N. P. C.* 168. (*b*) 8 *B. Moore*, 27.
(*c*) 5 *Taunt.* 225. 1 *Marsh.* 27.

limited

limited by the penalty of the bond. [*Littledale* J. The penalty is the limit in all such cases].

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Lord DENMAN C. J. It is admitted that the sureties were insufficient; the only question is, whether the defendant made a proper and reasonable inquiry. The only law to be collected from the cases is that which was laid down by *Abbott* C. J. in *Scott* v. *Waithman* (*a*), namely, that the sheriff is to exercise a reasonable discretion and caution in receiving sureties. Whether he has done so or not, is a question for the jury in each case; and the law cannot be laid down with more particularity. If the learned judge in this case had left it to the jury, as law, that, under the circumstances, the sheriff's clerk could not have made a sufficient inquiry, there might have been ground for this application; but he did no more than make a strong observation upon the case before him. And, if the fact was that the sureties were utterly insufficient, that they were brought to the office by the attorney's clerk, and that no inquiry was instituted beyond the receiving of such answers as they chose to give, no judge would direct a jury, and no jury should say, that a proper discretion was exercised in receiving those sureties. That being so, the sooner we make an end of the course of proceeding which was said here to be usually adopted, the better: otherwise it may be said that, wherever the parties live at such a distance that the sheriff cannot personally know of their circumstances, no further inquiry is necessary than to receive their own statement. There must, in any such case, be some other means of

(*a*) 3 *Stark. N. P. C.* 168.

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JEFFERY against BASTARD.

inquiry, as for example, by the attendance of a person from the neighbourhood in which the sureties live; and here the sheriff, if he had used such means, would have the benefit of *Mansfield* C. J.'s observation in *Hindle* v. *Blades* (*a*): "Suppose the sheriff had taken an eminent banker as surety a week before his bankruptcy, when no one in the world had the slightest reason to suspect his circumstances." The very circumstance of the clerk's taking an irregular affidavit from the sureties evinces his doubt of their sufficiency. His knowing nothing of the parties appears, certainly, a bad reason for proceeding upon their oaths. As for the omission to give the bond in evidence, we must put a reasonable construction upon what took place; we must take it that all parties considered the instrument as having been proved; it was ready to be put in at a moment's notice; and, in the references made to the bond during the trial, it must be considered that both sides were talking of the document which lay upon the table before them. No rule can be granted.

LITTLEDALE J. I may have made strong observations on the insufficiency of such an inquiry as was proved, and may have said generally that it was insufficient; but, if I did so, it was with reference to the particular case, and not as laying down a rule of law.

PATTESON J. The rule clearly is, that the sheriff shall exercise a reasonable discretion. If our present application of the rule would render it necessary for the sheriff to send about the country at his own expense to

(*a*) 5 *Taunt.* 225. 1 *Marsh.* 27.

make

make inquiries, I should hesitate as to refusing the rule. But, supposing that the sheriff knows the parties, he may accept them as sureties; supposing that he does not know them, he may decline receiving them till they satisfy him of their sufficiency, by the attendance of other persons, or by information from them in writing. I would not have it supposed that the sheriff or the replevin clerk is bound to go out of the office, and travel about for information; but he may require vouchers, personal or in writing. If that had been done here, there would have been a strong case for the sheriff.

COLERIDGE J. There is no question as to the rule, but only with respect to the application. I think we may lay it down that, if the sheriff is fixed with knowledge of the real state of facts, he is responsible, according to such knowledge: but, where he has it not, he is bound to make a reasonable inquiry into the apparent responsibility of the sureties offered. Here three persons come, two sureties and the attorney's clerk. The replevin clerk does not even inquire of the attorney's clerk as to the apparent responsibility of the sureties, but examines them as to their actual responsibility. I agree that the sheriff, or his clerk, is not bound to go out of the office; but he may satisfy himself without doing so. And upon this subject it is observable that the sheriff is bound by statute (*a*) to have four replevin clerks at least, dwelling not above twelve miles from each other.

Rule refused.

(*a*) 1 & 2 *Ph. & M. c.* 12. *s.* 3.

1836.

Thursday, April 21st.

JONES *against* DANIEL SHEARS, JAMES SHEARS, THOMAS MARGRAVE, and WILLIAM ELLWARD.

In assumpsit for rent of coal, the issue being whether or not the defendants, having given notice to quit, had afterwards waived the notice and continued the tenancy, it was proved that, after the time fixed by the notice had expired, they continued for two months working out certain portions of the coal, which, however, as they contended, it was usual for a tenant to take away on abandoning such a work: Held, that it was for the jury to decide on this issue, whether or not the defendants, in remaining for the two months, intended to waive the notice and continue the tenancy.

ASSUMPSIT on an agreement between the plaintiff and defendants, that the plaintiff should let to the defendants, and they take of him, the coal under certain lands, for twenty-one years; that the defendants should be at liberty at any time during the term to terminate the same, by giving six months' notice in writing to the plaintiff of such intention, if the whole of the coal were worked out, or on giving two years' notice at any time, or on paying two years' rent: and that the defendants should pay certain sums for royalty, way-leave, &c., and 100*l.* per annum sleeping rent. Averment, that the defendants entered, &c. Breach, non-payment of the sleeping rent for four years. Pleas, 1. Non assumpsit. 2. That on &c. the defendants gave notice in writing of their intention to terminate the term at the end of two years, and that, at the expiration of the two years, and before any of the rent claimed became due, viz. on &c., the term ceased by virtue of the said notice. Verification. Replication to the second plea, that the defendants, after giving the notice, and before the determination of the term, viz. on &c., waived, relinquished, and abandoned such notice, and agreed to a continuance of the term, and of their tenancy to the plaintiff, and

During all the time above-mentioned, the defendants constituted a firm, called the *Llangonneck* Coal Company. After the expiration of that time, the company appointed an agent. On the trial of the above action the plaintiff offered in evidence a letter of the agent, to shew a recognition, by the firm, of a continuing tenancy. Before the letter was written, or the agent appointed, two of the defendants had withdrawn from the firm, but the business was still carried on in the name of the *L.* Coal Company, and no notice of the change had been given to the public: Held, that the letter was inadmissible.

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the same continued in all respects as if the notice had not been given. Verification. The rejoinder traversed these allegations, and upon that traverse issue was joined.

On the trial before *Coleridge* J. at the last Spring assizes at *Carmarthen*, it appeared that the defendants, under the name of the *Llangonneck* Coal Company, signed the agreement declared upon, in 1828: that they entered upon and worked the coal; and that, in *April*, 1829, they gave a notice to the plaintiff, beginning, "We the undersigned, being the individuals composing the *Llangonneck* Coal Company," signed by the four defendants, and stating that at the expiration of two years they should deliver up possession and put an end to the term. The plaintiff's case was, that they had continued to work the coal for two months after the expiration of the two years, and had thereby waived the notice. The defendants insisted that the working was not carried on with any view of continuing the tenancy; that the coal worked during the two months was taken from the pillars of coal which supported the roof of the mine; and that it was customary, on leaving a mine, to cut away from such pillars as much as could be removed with safety. To shew that the defendants had in fact meant to continue the tenancy, a letter was tendered in evidence, written on behalf of the *Llangonneck* Coal Company, by a Mr. *Seymour*, their agent, in *July* 1835. Two of the defendants had at that time quitted the company; two continued members; and other persons had come in. The defendants had never notified this change in the firm to the public. *Seymour* had been agent about eighteen months; he became so after the retirement of the two defendants who left the

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company. The learned Judge held the letter inadmissible, being of opinion that *Seymour* could not, in writing it, be considered the agent of the four defendants. And he left it to the jury to say whether the defendants had continued working the coal with intent to waive the notice and continue the tenancy, or without such intent. The jury found a verdict for the defendants on the second issue.

Wilson now moved for a rule to shew cause why there should not be a new trial on the grounds of misdirection, and of an improper rejection of evidence. The question of intent ought not to have been submitted. When a tenant holds over after his lease is determined, whether by efflux of time or by matter collateral, an absolute legal liability is incurred, and there is no question of intent for a jury. Here the working from the pillars was the same, in point of law, as if the defendants had entered upon an unworked seam. The plaintiff might, at his option, treat them as trespassers or tenants. In *Digby* v. *Atkinson* (*a*) Lord *Ellenborough* said, "Where the tenant holds over after the expiration of the term, he impliedly holds subject to all the covenants in the lease which are applicable to his new situation." Nothing is said there of a question of intent to be decided by the jury. In *Right dem. Flower* v. *Darby* (*b*) Lord *Mansfield* said, "If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract." If intention may be relied upon, where the party holds over for months, it may as

(*a*) 4 *Camp.* 278. (*b*) 1 *T. R.* 159.

well

well be so if he hold on for years. [*Patteson* J. Your argument would go the length of insisting that, if a tenant gave notice to quit at *Lady-day*, and remained a week after, for his own convenience, he could not dispute that his intention was to renew the tenancy.] If the landlord, in such a case as this, does not treat the parties as trespassers, his intention, in suffering them to remain, must be considered, as well as that of the tenant in remaining. [*Littledale* J. Surely an issue like the present makes the waiver a question for the jury.] As to the rejection of evidence: *Seymour*'s letter ought to have been received. The firm of the *Llangonneck* Coal Company continued from the time when the agreement was executed till the writing of the letter. No change in it was made known to the public. And two of the defendants still remained members. *Seymour* is at least agent for them. For the purpose of an action like this, a letter by two of four joint lessees would bind their companions; so also will the letter of an agent for those two.

Lord DENMAN C. J. There is no ground for a rule. It was impossible, upon this issue, not to leave the question to the jury; and it was for them to decide whether the parties, by their mode of continuing in possession, shewed an intention to waive their notice to quit, and to remain tenants as before. Then as to the letter. In 1831 the four defendants were members of the *Llangonneck* Coal Company. The letter in question was written by an agent of the company in 1835. Now although *Seymour* might be the agent of the present company for all purposes for which they now employ one, he could not be their agent for the purpose of

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binding, by his letter, persons who were no longer members.

LITTLEDALE J. I do not know that, where a tenant holds over, he is always to be considered as bound to hold upon the same terms as far as they are applicable. In *Digby* v. *Atkinson* (*a*) the rent was raised; that change alone could not vary the obligation to repair: but, if one half of the terms of holding were to be changed, I do not know that the tenant holding on would be bound, in point of law, to keep the other half. Here, however, the question was, not whether the parties held over on the terms of the original tenancy, but whether they held over as tenants at all. It was for the jury to say whether the defendants intended to avail themselves of their notice to quit, or whether the acts done by them amounted to a waiver of such notice (*b*). As to the letter written by *Seymour*, the notice in 1829 was given by four members. Afterwards two went out of the firm. When *Seymour* became agent and wrote the letter, he was not agent to the four defendants, but to the new firm. It is contended that, being agent for two of the defendants, he was agent in this instance for the four. But the two who left the firm had not entered into any agreement which could make them answerable for his acts.

PATTESON J. This is an action upon an agreement, entered into by four persons, to become tenants of coal for a term, a power being reserved to them to end the

(*a*) 4 *Camp.* 275.

(*b*) See *Johnson* v. *The Churchwardens of St. Peter, Hereford*, antè, p. 520.

term

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term by a notice. The plea is, that such notice was given; but it is replied that the tenants waived the notice; and upon that replication issue is taken. It is contended that a mere possession by the tenants, after the expiration of the time limited by the notice, precluded the jury from inquiring whether their notice was waived or not. But, upon this subject, the authorities decide only that, where there is an actual continuance of possession by the tenant, the terms of holding are considered to be the original ones. The question in *Digby* v. *Atkinson* (*a*) was, upon what terms the parties held on, not whether they continued tenants. It is, of course, a question for the jury in such a case, whether the possession was continued at all. It is also for the jury to consider under what circumstances it was continued; whether, for instance, the parties acted on a supposed right, or as knowing themselves to be trespassers. Here I should suppose that the defendants thought they had a right to take the coal from the pillars after they gave up the works. The circumstances were such as it was necessary and proper to leave to the jury, in order that they might say whether or not the notice was waived and a new tenancy commenced. As to the letter, it is clear that *Seymour* never was agent to the four defendants under the agreement in question. The time limited by the notice to quit expired in *April* 1831. There is nothing to shew that, at least after the expiration of two months from that time, any tenancy in point of fact was continued on the premises in question. And *Seymour* did not become agent to the company till long afterwards. How then could he be agent to the four defendants for the purpose

(*a*) 4 *Camp.* 275.

of

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of writing the letter of *July* 1835, even if all of them were proved to have been members of the company at that time?

COLERIDGE J. concurred.

Rule refused.

Thursday, April 21st.

LEWIS *against* Lady PARKER.

Assumpsit by indorsee against acceptor of a bill of exchange. Plea, that the bill was an accommodation bill, indorsed to plaintiff's indorser for the purpose of its being discounted for defendant's use; that it was indorsed to plaintiff in fraud of defendant, and that plaintiff took the bill, by such indorsement, after it was due. Replication, that the bill was indorsed to plaintiff before it became due, he not knowing the premises, without this, that plaintiff took it after it was due. Issue thereon: Held that, at the trial, it lay on the defendant to begin, by proving that the bill was due when indorsed.

ASSUMPSIT against defendant as acceptor of a bill of exchange, drawn by *Miles*, payable to his order, and indorsed by him to *Elkins*, who indorsed to plaintiff. Also on an account stated. Plea, that *Miles* drew, and defendant accepted, the bill for the accommodation of defendant, and that *Miles* might get it discounted and thereby raise money for her use, and without any value or consideration given by *Miles* for her acceptance; that *Miles* indorsed to *Elkins*, without having received any consideration, and for the purpose aforesaid; that *Elkins* received the bill for the purpose of discounting it, but did not do so, nor did he pay defendant or *Miles* any money on account of the bill, or otherwise give defendant or *Miles* any value or consideration for the same, and, on the contrary, the said *Elkins*, having notice of all the premises, indorsed the bill to plaintiff in fraud of defendant: and, further, that plaintiff took the bill by indorsement from *Elkins* after it became due, viz. on &c. Verification. There were two other pleas, not material to the point decided.

Replication, that *Elkins* indorsed the bill to plaintiff before it became due, plaintiff not knowing the premises

in

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in the said plea mentioned; without this, that plaintiff took the bill by indorsement from *Elkins*, after it had become due. Conclusion to the country. Similiter. On the trial before *Williams* J., at the sittings in *Middlesex* during this term, it became a question whether, upon these pleadings, the plaintiff was bound, in the first instance, to shew that the bill was indorsed before it was due, or the defendant to shew that it was indorsed after having become due. The learned Judge held that the onus lay on the defendant; and, no evidence being offered on her part, the plaintiff had a verdict.

Barstow now moved for a new trial on the ground of misdirection. The object of this motion is to raise a question similar to that now depending in *Mills* v. *Barber* (*a*) in the Court of Exchequer. The plaintiff, by his replication, admits the want of consideration between *Miles* and the defendant, and *Elkins* and *Miles*, and the indorsement by *Elkins* in fraud of the defendant. Suppose that, before the new rules, these facts had been proved by the defendant under the general issue; the plaintiff would have been bound to shew that he took the bill before it was due, or that he gave consideration. The defendant here could not prove the negative of those facts; it did not lie within her knowledge. [Lord *Denman* C. J. The answer to that might be, "Why did you plead that which you were unable to prove?"] The prevailing opinion in the Court of Exchequer, in *Simpson* v. *Clarke* (*b*), was that, where a bill was shewn to have been given for accommodation between the

(*a*) Decided in this term, 1 *Mee. & Welsb.* 425. The Court of Exchequer there held, after conference with the other Judges, that the defendant ought to begin.

(*b*) 2 *Cro. M. & R.* 342. 5 *Tyrwh.* 593.

original

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original parties, a subsequent holder ought to prove consideration. And in *Whittaker* v. *Edmunds* (*a*) *Patteson* J. said, "If, indeed, the defendant can shew that there has been something of fraud in the previous steps of the transfer of the instrument; that throws upon the plaintiff the necessity of shewing under what circumstances he became possessed of it." [*Littledale* J. The only issue to try on this record was, whether or not the bill was indorsed after it became due.]

Lord Denman C. J. No case in point has been cited; there must therefore be no rule.

Littledale, Patteson, and Coleridge Js. concurred.

Rule refused (*b*).

(*a*) 1 *M.* & *Rob.* 366. *S. C.*, in banc, 1 *A.* & *E.* 638.
(*b*) See *Low* v. *Burrows*, 2 *A.* & *E.* 483.

Friday, April 22d.

Evans *against* Davies.

In assumpsit on a promissory note bearing interest, proof that defendant, being sent to by plaintiff for money, paid 1*l.*, and said, "this puts us straight for last year's interest, all but 18*s.*; some day next week I will bring that up," is sufficient answer to a plea of the statute of limitaations, no evidence being given of any other debt due from defendant to plaintiff.

Assumpsit on a promissory note, dated *November* 19th 1809, for 100*l.* payable on demand, with interest, and on an account stated. Plea (among others), the statute of limitations. Replication, that the causes of action did accrue, &c. Issue thereon. On the trial before *Williams* J., at the *Shropshire* Spring assizes in this year, it appeared that the action was brought to recover the amount of the note, and

29*l.*

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29*l.* 0*s.* 2*d.* interest. To take the case out of the statute, the plaintiff proved that, in 1831, his son called upon the defendant and said, "my father sent me to ask you to let him have a pound;" upon which the defendant paid the son a pound, and said, "this puts old Mr. *Evans* and me straight for last year's interest, all but 18*s.*; some day next week I will bring that up and get a receipt from the old man." Nothing appeared on the note to indicate any payment of interest within six years. No proof was given of any other debt from the defendant to the plaintiff than that upon the note. *Tippets* v. *Heane* (*a*) was cited for the defendant. Leave was given to move to enter a nonsuit if the Court should think that case applicable. The learned Judge, after observing that the 1*l.* must have been paid in respect of the note, or the plaintiff could not succeed, left the case to the jury, who gave a verdict for the plaintiff for the whole amount claimed.

R. V. Richards, on a former day of the term (*b*), moved for a rule to shew cause why a nonsuit should not be entered, or a new trial had. The judgment of *Parke* B., in *Tippets* v. *Heane* (*a*), applies to this case. [Lord *Denman* C. J. There the payment might have been by way of settling a balance; or it might have been the price of a particular article.] Here no allusion was made to the note at the time of payment; and primâ facie the payment would not seem referable to the note, 1*l.* 18*s.* not being the year's interest on 100*l.* This payment was not indorsed upon the note. The

(*a*) 1 *Cro. M. & R.* 252.

(*b*) *April* 20th. Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

admission

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admission of such evidence would let in all the mischief which the statute was intended to prevent.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. After stating the facts, his Lordship said: *Tippets* v. *Heane* (*a*) was cited for the defendant; but we think that case essentially different. We have consulted my brother *Parke*, whose judgment in that case was referred to. Here it appears clearly enough that the payment was made on account of an existing debt; and there was no proof of any other debt than that in question; we therefore think that the jury were warranted in applying it to that. And we think that the effect of the admission is not to be restrained to the year's interest, but extends to the whole amount claimed. There will, therefore, be no rule.

Rule refused.

(*a*) 1 *Cro. M. & R.* 252.

Saturday, April 23d.

The KING *against* The Justices of STAFFORDSHIRE.

A party appealing against an order of justices for payment of a church rate, under stat. 53 G. 3. c. 127. s. 7., need not give notice of appeal to the justices making the order; it is sufficient to give it to the churchwardens.

And, if such notice to the justices were necessary, service of it upon one of the justices would suffice.

THOMAS STONOR SIMPKISS was summoned before two justices, pursuant to stat. 53 G. 3. c. 127. s. 7., for nonpayment of a church-rate; and an order was made upon him to pay. He gave notice to the two justices, and to the churchwardens, that he should, at the next (*April*) quarter sessions for *Staffordshire*, move

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to enter and respite the appeal, which was accordingly done. Previously to the ensuing (*June*) quarter sessions, he gave notice of trying the appeal to the then churchwardens, and to one only of the magistrates who had made the order. The sessions refused to hear the appeal, on the ground that notice of trial had not been given according to the practice of the sessions, having been served on one only of the two justices. A rule nisi was afterwards obtained for a mandamus to the justices of the county to enter continuances, and hear the appeal. In opposition to the rule, a clerk in the office of the clerk of the peace deposed that, during the last sixteen years, it had been the practice of the sessions, when appeals were to be tried against convictions or orders of justices out of sessions, except orders of removal, to require that notice of appeal should be served on each justice making the order or conviction; and he referred to the printed rules of the sessions as to notices; which, however, contained no direction as to the persons upon whom notices should be served.

Whateley now shewed cause. If the rule of practice, as sworn to, be reasonable, the Court will support it. It may be important that the justices should both have an opportunity of defending their own order. But if both are not entitled to notice, neither is. Supposing that one justice had left the country, the notice might be given to him, purposely omitting the other. [*Littledale* J. If half a dozen signed, must there be notice to all?] The argument must go that length: but it is not the practice for such a number to sign orders.

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Wightman, contrà. There is no occasion to serve the magistrates at all, if notice be given to the churchwardens, who are the real parties. At all events both magistrates need not be served. (He was stopped by the Court.)

Lord DENMAN C. J. The appellant has entitled himself to the writ. The sessions have no right to introduce a new condition of appeal, which is not in the act of parliament. And, if notice to the justices were necessary, service on one would be sufficient. It has been so held under other statutes which require the giving of notice to justices.

LITTLEDALE J. concurred.

PATTESON J. The statute 53 G. 3. c. 127. s. 7. only says that the party aggrieved by the order of two or more justices may appeal: nothing is said of notice.

COLERIDGE J. The two justices act together on a joint authority (a); notice to one would be sufficient.

Rule absolute.

(a) See *Rex* v. *Silifant*, antè, p. 354.

MORRIS *against* DIXON.

Monday, April 25th.

ASSUMPSIT for money lent, and on an account stated. Pleas, 1. The general issue. 2. That defendant did not promise within six years. Issues were joined on both. The particular of demand was for cash lent, principally in 1824. On the trial before *Vaughan* J. at the *Chester* summer assizes 1834, some evidence was given as to the contracting of the debt; and it appeared that the last advance made by the plaintiff to the defendant was in *August* 1826. The only evidence of an acknowledgment by the defendant within six years before the commencement of the action was the following memorandum given by him to the plaintiff.

Under Lord *Tenterden*'s act, 9 *G.* 4. *c.* 14. *s.* 8., the following memorandum, — "I acknowledge to owe *M.* 36*l.*, which I agree to pay him as soon as my circumstances will permit," — is exempt from stamp duty, as a writing made necessary by that statute, provided it be put in for the mere purpose of barring the statute of limitations, the debt itself being proved by other evidence.

"*Chester, June* 30th 1832.

"I acknowledge to owe Mr. *James Morris* of *Bolton* the sum of 36*l.* which I agree to pay him as soon as my circumstances will permit me so to do.

"*John Dixon.*"

Evidence was given to shew the defendant's ability to pay at the time when the action was brought. For the defendant, it was objected that this paper ought to have had an agreement stamp, as an agreement, or as a note payable on a contingency and not to bearer or order, within the first head of exemptions in stat. 55 *G.* 3. *c.* 184. sched. part 1, tit. *Promissory Note.* The learned judge gave leave to move to enter a nonsuit on this point; and the plaintiff had a verdict for 36*l.* *John Jervis* in the next term moved according to the

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leave reserved; and he cited *Smith* v. *Nightingale* (*a*), and (comparing the instrument to a cognovit) *Ames* v. *Hill* (*b*) and *Reardon* v. *Swaby* (*c*). A rule nisi was granted.

Cottingham and *Cowling* now shewed cause. No stamp was necessary. This was not an agreement, but a mere acknowledgment, and therefore admissible in evidence without a stamp; *Fisher* v. *Leslie* (*d*), *Israel* v. *Israel* (*e*), *Mullett* v. *Huchison* (*g*), *Langdon* v. *Wilson* (*h*). It contains no promise but such as the law would imply from the acknowledgment. [*Littledale* J. The promise here is not that which the law would imply; it is to pay when the party is able. It renders proof of ability necessary on the plaintiff's part. *Patteson* J. Ought not you to have declared specially, on a qualified promise to pay?] The judgment of the Court in *Tanner* v. *Smart* (*i*) seems to intimate that that would be the proper form; but this point was not taken at the trial. The plaintiff here is no party to the instrument; it does not bind him to wait for his money. There is not the mutuality which is necessary to an agreement. In *Green* v. *Gray* (*k*) a cognovit, containing a promise by the defendant to bring no writ of error, &c., and to take no advantage of the cognovit having been given before declaration, was held not to require a stamp, there being no mutual agreement. In *Lees* v. *Whitcomb* (*l*) a written undertaking by a servant to remain with her mistress to learn a trade was held not to be a binding agreement within the statute of frauds, because it contained no

(*a*) 2 *Stark. N. P. C.* 375.
(*b*) 2 *B. & P.* 150.
(*c*) 4 *East*, 188.
(*d*) 1 *Esp. N. P. C.* 426.
(*e*) 1 *Camp.* 499.
(*g*) 7 *B. & C.* 639.
(*h*) 7 *B. & C.* 640. note (*b*).
(*i*) 6 *B. & C.* 603.
(*k*) 1 *Dowl. P. C.* 350.
(*l*) 5 *Bing.* 34.

engagement

engagement on the mistress's part. By sect. 8. of stat. 9 *G.* 4. *c.* 14. (for rendering a written memorandum necessary to the validity of certain promises) it is enacted "That no memorandum or other writing made necessary by this act shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps." This was a memorandum made necessary by the act, sect. 1., to take the debt in question out of the statute of limitations.

J. Jervis, contrà. The statute of limitations had not attached when this paper was given. There is no proof that it was given to prevent the operation of the statute; it may have been an original promise, and so not within Lord *Tenterden*'s act, 9 *G.* 4. *c.* 14. And, if it was executed for the purpose of barring the statute, it may be assumed that the parties were stating an account together, and that, by consent, a writing in the words here used was signed in order that the statute might not run. Then it is an agreement. Or the case may be put thus: leaving out the words, "as soon as my circumstances will permit me to do so," this is a promissory note: with the addition of those words, it is a promise within the stamp act. The object of Lord *Tenterden*'s act was to exclude loose verbal expressions which had formerly been relied upon as barring the statute, providing, at the same time, that parties should not be subjected to a new burden of stamp duty. It does not follow that, if that is put into writing which before the statute would have required a stamp, the stamp shall no longer be requisite. In *Williamson* v. *Bennett* (*a*) an instrument signed by the defendants,

(*a*) 2 *Camp.* 416.

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acknowledging that they had received of the plaintiffs 200*l.* in three drafts payable to the defendants at certain periods, which they promised to pay to the plaintiffs with interest, was held to be a special agreement; yet the reasons against that construction were very like those which occur in the present case. [*Littledale* J. The clause exempting from stamp duty seems nugatory, unless the act was meant to apply where words of agreement were used; because in other cases, even independently of the act, no stamp would be requisite]. Perhaps the clause was inserted from excess of caution. According to the argument now used, any agreement for payment of a debt might be exempted from stamp duty, on the suggestion that it was intended to bar the statute of limitations.

Lord DENMAN C. J. I thought, at first, that there had been no evidence in the case respecting the debt besides this document, which certainly is an agreement, and, under other circumstances, would require a stamp. But there was other evidence of the debt. This evidence, therefore, comes within the eighth section, which enacts, that no memorandum or other writing "*made necessary by this act*" shall be deemed an agreement within any of the stamp acts. The act points out no particular form of memorandum or writing as necessary; but I think it cannot be said that the instrument in question is not a writing of that quality which the statute makes necessary.

LITTLEDALE J. The undertaking here is in a qualified form; but still it is the promise which is relied upon for the purpose of taking the case out of the limitation.

limitation. It is, therefore, within the exemption of stat. 9 G. 4. c. 14. s. 8. 1836.

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PATTESON J. concurred.

COLERIDGE J. This was an instrument made necessary by the act 9 G. 4. c. 14., for barring the statute of limitations: and it was used for no other purpose. If there had been no other evidence of the original debt, I should have thought that it was used to prove that; but, there being evidence of the original debt, independent of this, I think that it was used under the statute, and is exempted by it from stamp duty.

Rule discharged.

The KING *against* MORLEY.

Monday, April 25th.

On attachment for a contempt, where the defendant has been examined on interrogatories, and the Master of the Crown Office directed to report thereon to the Court, if he reports that the defendant has cleared himself of the contempt, the Court will not enter into a discussion of the correctness of such report, unless it appear, by the interrogatories and answers (*Semble*, not by affidavit), that the Master has been mistaken. It is not sufficient ground for a review, that the Master's report appears contradictory to the opinion of a Judge who granted the attachment.

IN *Trinity* term 1835, a rule was obtained, calling on the defendant to shew cause why an attachment should not issue against him for his contempt in not attending the trial of a cause as a witness, pursuant to subpœna. In the ensuing *Michaelmas* term, cause was shewn in the bail court before *Littledale* J., who ordered that it should be referred to the Master to inquire whether the defendant's clerk was at *Westminster* at or before five minutes after ten on the morning of the day of trial, and, if he was, that the rule should be discharged, but, if the Master should find that he was not, then that the rule should be made absolute. The

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Master reported that he was not, and the rule was made absolute for an attachment. Interrogatories were thereupon administered to the defendant; and it was ordered by the Court that such interrogatories, and the defendant's answer thereto, should be referred to the coroner and attorney of this Court, to examine the same, and report thereupon to the Court; and the defendant entered into recognizances to answer. The defendant, in his answers, did not state that his clerk was at *Westminster* at or before five minutes after ten on the morning in question, or that any attendance was given by defendant, or on his behalf, at that time; but stated merely that he sent his clerk to *Westminster* between nine and ten that morning, and that the clerk, on arriving, found that the cause had been decided, three or four which stood before it having gone off suddenly; and that this alone caused defendant's absence. The Master of the Crown Office reported as follows: — "I have examined the interrogatories and answers above referred to me, and am of opinion that the above-named defendant hath cleared himself of the contempt imputed to him."

The Master's report being now read, on the motion of *Turner*,

E. V. Williams moved that the interrogatories and answers should be read, and that the Master of the Crown Office might be directed to review his report. The Master's report is not conclusive; his inquiry is only in ease of the Court (like taxation of costs); and, if his report be manifestly contrary to the opinion of the Judge who granted the attachment, it ought to be reviewed. [*Littledale* J. He sifts the matter more fully, upon the interrogatories,

interrogatories, than the Judge could.] In 3 *Hawk. P. C.* Book 2. c. 22. s. 1. (*a*), where the practice on this subject is stated, it is said that, "If the party fully purge himself upon oath, in his answer to such interrogatories of the whole matter charged upon him, the Court will discharge him of the contempt, and leave the prosecutor to proceed against him for the perjury, if he thinks fit: But if the party confess part of the contempts in his answer to such interrogatories, and deny others, the Court will not discharge him from the contempts so denied, but will proceed farther to examine the truth of them, and will inflict such punishment as from the whole shall appear reasonable: Neither will the Court discharge the party upon a shifting or evasive answer to any material part of the charge against him, but will punish him in the same manner as if he had confessed it." [*Littledale* J. If the Master clears him of the contempt, the Court does nothing; if the case is doubtful, the Court will consider of it; if the Master reports the party to be in contempt, the case comes before the Court for decision as to the punishment. Have you any authority for an interference in such a case as this?] No similar case has been found. In *Coulson* v. *Graham* (*b*), where the Court refused to hear the Master's report discussed, he had reported the party in contempt; and the defendant wished to file affidavits in addition to the interrogatories. [Lord *Denman* C. J. Have you any ground to shew for reviewing this report?] The report is contrary to the opinion of the learned Judge who granted the attachment. The Court is asked to look into that point. [Lord *Denman* C. J. That would be rehearing the

(*a*) P. 273., *Leach*'s edition, 1795. (*b*) 2 *Chitt. Rep.* 57.

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case. I do not say that, if we found that the Master was mistaken, we should not desire a review of his report. But some ground must be laid for it.] Affidavits can be put in on behalf of the prosecution. [Lord *Denman* C. J. If there has been a mistake, it will appear from the interrogatories and answers.] The only ground independent of affidavit is that already stated.

Per Curiam (*a*),

Rule refused.

Turner then moved that the defendant's recognizances should be vacated, which was ordered.

(*a*) Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

Tuesday, April 26th.

RICHARD SLEGG and Another, Executors of JOHN SLEGG, *against* PHILLIPS.

C. and *P.* made a joint and several promissory note for 200*l.* with interest. *P.*, being sued solely, pleaded illegality of consideration: Held, that *C.* was not a competent witness to support this plea.

And that it made no difference that *C.*, before action brought, had paid 100*l.* of the note, a year's interest being also due at the time of such payment; inasmuch as *C.*, in case a verdict were given against *P.*, would be liable to contribution in respect of that interest.

ASSUMPSIT against the defendant as maker of a promissory note, dated 15th of *March* 1830, for 200*l.*, payable to the testator, 15th of *May* 1830, with interest at 5 per cent. till paid. There was also a count for money lent, money paid, interest, and an account stated.

First plea, to the first count, that, before the time of making the note, to wit, &c., *Charles Crippen*, as the agent for and in the name of one *Alexander Kennedy*, had become and was indebted to divers, to wit, twenty persons, in various sums, amounting in the whole to a large

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large &c., to wit, 1200*l.*, upon and by virtue of divers unlawful wagers, and contracts in the nature of wagers, relating to the future price and value of certain public stock called consols, that is to say &c. (the plea then set out facts to shew that the debt arose on a transaction rendered illegal by stat. 7 *G.* 2. *c.* 8.): and that, thereupon, the said *C. C.* was desirous of obtaining a loan of 200*l.*, for the purpose of enabling him therewith in part to pay and satisfy the said sum of 1200*l.*, and did accordingly apply to and request *Slegg*, in his lifetime, to lend him the said sum of 200*l.* in the said promissory note specified; which *Slegg* consented to do, and did accordingly lend the said sum to *C. C.* for the purpose aforesaid, and on no other account; and thereupon the defendant, in the lifetime of *Slegg*, to wit, &c., made the note for the purpose of securing to *Slegg* the payment of the said sum of 200*l.*; whereby, and by force of the said statute in such case &c., the said note became, and was and still is, void in law. Verification. Replication: that the 200*l.* in the said note specified was not, nor was any part thereof, lent by *Slegg*, with knowledge of the supposed premises in the said plea mentioned, or for the supposed purpose in that plea alleged: conclusion to the country. Similiter. Second plea, to the other counts: Non Assumpsit.

On the trial before Lord *Denman* C. J., at the *Middlesex* sittings after *Michaelmas* term 1834, the plaintiffs put in and proved the note, which was a joint and several note made by *Phillips* and *Crippen*. The defendant then called *Crippen* in support of the first plea, and proved that *Crippen* had paid 100*l.* to the plaintiffs on account of the note, before the action was brought, on the 18th of *June* 1831. The plaintiffs' counsel

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counsel objected that *Crippen* was still incompetent; and the Lord Chief Justice, being of that opinion, rejected the evidence, and the plaintiff had a verdict.

In *Hilary* term 1835, *Erle* obtained a rule nisi for a new trial, on the ground of the rejection of this witness.

Sir *F. Pollock* and *R. V. Richards* now shewed cause. The witness was incompetent, because, if the plaintiffs recovered against the present defendant, the latter might obtain contribution from the witness for both damages and costs; 1 *Stark. Ev.* 106. (2d ed.), *Simons* v. *Smith* (*a*), *Hall* v. *Rex* (*b*), *Evans* v. *Yeatherd* (*c*). It is true that, as far as the present action is concerned, the liability is severed; but that does not affect the ultimate liability of the proposed witness to the result of the action. Thus, in the case of a joint and several bond, if one obligor be sued alone on his own several contract, he may still recover contribution against the other obligor. A release to one is a release to both; each, therefore, has an interest in defeating the claim, though made on one only. The witness would have been admissible for the plaintiffs on the grounds stated in *Blackett* v. *Weir* (*d*), *Hall* v. *Curzon* (*e*), *York* v. *Blott* (*g*). As for the payment by *Crippen*, that leaves him still liable for the interest on the 100*l.* paid.

Erle, contrà. It is true that the extinction of the debt as to one of two joint and several obligors, and perhaps as to one of two joint and several makers of a note, extinguishes as to both. But here *Crippen* has

(*a*) *Ry. & M.* 29.
(*b*) 6 *Bing.* 181.
(*c*) 2 *Bing.* 133.
(*d*) 5 *B. & C.* 385.
(*e*) 9 *B. & C.* 646.
(*g*) 5 *M. & S.* 71.

already

already paid all which he could be called upon to contribute. No interest is shewn to be unpaid on the 100*l.*; and he is not liable to the costs of the action, it not appearing that he has authorised the defence; *Knight* v. *Hughes* (*a*). This answers the argument from the cases cited, where an interest arose from the liability to costs. *Crippen* has here a greater interest in the success of the plaintiffs than in that of the defendant. If the plaintiffs succeed, no liability accrues to him: and, even if the defendant could in that case recover contribution, it could be for only 50*l.*, as the plaintiffs can recover only 100*l.*, and the plaintiffs' claim against *Crippen* is then extinguished. But, if the defendant succeed, the plaintiffs may sue *Crippen* for all the 100*l.* [*Patteson* J. He comes to prove that no action lies at all.] The test of his competency is, not the particular evidence which he is to give, but the effect which the verdict will have on his interest.

Lord DENMAN C. J. I rejected this evidence at the trial on the authority of the cases in the Common Pleas. It is not denied that *Crippen*, if he had not paid the 100*l.*, would be liable to contribution. But, at the time of his paying, a year's interest was due on the 100*l.*, as well as the remaining principal and interest. There was, therefore, still a charge remaining upon him; and he had a direct interest: for, if the plaintiffs recovered against the defendant, the defendant could recover a part from *Crippen*. Then he comes to shew that the plaintiffs cannot recover, because the consideration was illegal. And it is argued that he would, in fact, be

(*a*) *M.* & *M.* 247.

benefitted

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benefitted by the plaintiffs' recovering here, because the sum so recovered would go to exonerate him, as between himself and the plaintiffs. It seems to me that it is not in the defendant's mouth to say this: for his defence is that the note is a nullity; and the same defence would be available for *Crippen*.

LITTLEDALE J. I think the witness was not competent. If he had paid the full amount for which he was liable, he would not be liable to contribution. But he has not done so; and therefore he seems to be interested: for *Phillips* would sue him, if the plaintiffs recovered, for contribution in respect of the difference between what he has paid and what he was liable for. And, as for the chance of the plaintiffs' recovering against *Crippen* if they failed against *Phillips*, that might depend upon many contingencies. Then, again, *Crippen* comes to prove that the note was illegal. If one maker of a note can prove illegality on behalf of the other, and so defeat the action, the other may also prove the illegality when the first is sued: and so the two makers may get rid of the liability altogether.

PATTESON J. I am of opinion that the witness was rightly rejected. He was called to prove a plea that the consideration was unlawful, not, as in some of the cases, to defeat the action by proving his own joint liability. Perhaps that circumstance makes no great difference. But it is clear that, if the plaintiffs recover, the defendant will be entitled to contribution from *Crippen*: the latter has therefore a direct interest in defeating the action. I admit that, if he had paid all which the defendant could obtain by way of contribution,

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tion, his interest would be gone. But that he has not done: he has paid only half the principal; and the interest on that half remains due from him; so that the defendant would recover from him at least 5*l*. Then it is said that, if the plaintiffs fail in this action, they will sue *Crippen* for the whole. That is a very uncertain and contingent interest. I admit that, if *Crippen* were sued, he could not avail himself of a verdict obtained by the defendant in this action: but the result would be that, he having proved the illegality on behalf of *Phillips*, *Phillips* might prove it afterwards on behalf of *Crippen*. In *Hall* v. *Rex* (*a*) the Court held that the direct interest must prevail, not the contingent.

COLERIDGE J. The argument founded upon the payment would be sound, if borne out by the facts; but the interest on the principal paid is still unsatisfied. The argument that *Crippen* is more interested to obtain a verdict for the plaintiffs than for the defendant has already received an answer. *Crippen* comes to defeat the instrument upon which the action is brought, and thereby to prevent any action against himself for contribution. The other liability suggested is more remote.

Rule discharged.

(*a*) 6 *Bing.* 181.

Wednesday, April 27th.

Don NUNO ALVARES PEREIRA DE MELLO, Duke DE CADAVAL, *against* THOMAS COLLINS.

Plaintiff being a foreigner, ignorant of the *English* language, was arrested at *Falmouth* soon after his first arrival there from abroad, by defendant, for 10,000*l.* Defendant and plaintiff then signed an agreement, by which, in consideration of 500*l.* paid by plaintiff to defendant, plaintiff was to be discharged, and not to be again arrested; and, plaintiff was to put in bail in twelve days; the 500*l.* was to be "as a payment in part of the writ;" and both parties were to abide the event of the action; the agreement containing no provision for refunding the money if the action should fail. Plaintiff paid the 500*l.* and was released. No bail was put in; and the writ was afterwards set aside for irregularity. Plaintiff then sued defendant for the 500*l.* as money had and received; and the jury found that defendant knew that he had no claim upon plaintiff:

Held, that the action lay, the payment having been made under the compulsion of colourable legal process.

ASSUMPSIT for money had and received, and on an account stated. Plea, Non assumpsit. On the trial before Lord *Denman* C. J., in *London*, *February* 1835, it appeared that the plaintiff was a *Portuguese* nobleman, who had been a member of the *Portuguese* government under Don *Miguel*. In *July* 1834, the plaintiff arrived at *Falmouth*, with his family, from *Portugal*. Soon after his arrival, he received a letter from the defendant, dated 26th of *July* 1834, stating that he had claims on the government of Don *Miguel* to the amount of 16,200*l.*, for services performed and pay due, as asserted; but making no claim on the plaintiff individually. The plaintiff took no notice of this letter. On the 5th of *August* he was arrested at the suit of the defendant, on a writ for 16,200*l.* against the plaintiff and *Manuel* Viscount *de Santarem*. The affidavit was for 10,000*l.* and upwards for work and labour. The plaintiff, who did not understand *English*, applied to the *Portuguese* Vice-Consul at *Falmouth*, and had an interview, in his presence, with the defendant, his brother, and an attorney, who attended on behalf of the defendant: and, after some negotiation, the following memorandum was drawn up and signed: —

"We,

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"We, the undersigned, agree to the following conditions: —

"First, his Excellency the Duke of *Cadaval* pays 500*l.* in lawful money of *Great Britain* to *Thomas Collins*, as a payment in part of the writ issued in *London* for 16,200*l.*, and the remainder his Excellency to give bail immediately: to run the usual course of an action in the Court of King's Bench: both of us the undersigned to abide by the result: the said 500*l.* to be paid at nine o'clock to morrow morning, for which Mr. *Lake* the consul is responsible.

"*Falmouth*, *5th August* 1834. Duque *de Cadaval*.

"*Thomas Collins*."

The plaintiff was then released; and, on the 6th of *August*, the following agreement was signed by the parties: —

"An agreement made and entered into, this 6th day of *August* 1834, between *Thomas Collins*, of *Platt Terrace*, in the county of *Middlesex*, Esquire, of the one part, and his Excellency the Duke *de Cadaval*, at present residing at *Falmouth*, in the county of *Cornwall*, of the other part. Whereas the said *Thomas Collins* did lately cause a writ of capias to be issued out of His Majesty's Court of King's Bench at *Westminster* against the said Duke *de Cadaval* and one *Manuel* Viscount *de Santarem*, at the suit of him the said *Thomas Collins*, for the sum of 16,200*l.*, and whereas the said Duke *de Cadaval* was, on the 5th day of the said month of *August*, at *Falmouth* aforesaid, arrested and taken into custody by virtue of a warrant granted on the said writ of capias by the sheriff of *Cornwall* aforesaid, and whereas (*a*) the said Duke *de Cadaval*, not being at

(*a*) *Sic.*

present

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present prepared to give the required bail to the said sheriff of *Cornwall:* and it is hereby declared and agreed by and between the said *Thomas Collins* and the said Duke *de Cadaval* that, in consideration of the sum of 500*l.* of lawful *British* money to the said *Thomas Collins* in hand paid by the said Duke *de Cadaval*, at or upon the execution of these presents, the receipt whereof he doth hereby acknowledge, he, the said *Thomas Collins*, doth hereby consent and agree that he, the said Duke *de Cadaval*, shall be forthwith discharged from his said arrest, and shall not be taken or deemed liable to be taken again into custody by virtue of the aforesaid warrant or otherwise, except in execution; and the said Duke *de Cadaval* doth for himself, his executors and administrators, covenant, promise, and agree to and with the said *Thomas Collins*, his executors and administrators, that he will, within twelve days from the date hereof, give bail to the action, according to the form of the statute in such case provided, being in accordance with the tenor of an agreement entered into between the said parties, bearing date the 5th day of the said month of *August* (which agreement has been this day destroyed, but is to be held in full force and vigour by these presents) as follows, that is to say: — "We, the undersigned, &c. [here the agreement of the 5th of *August* was set out.]

"In witness whereof the said parties have hereunto set their hands, the day and year first above written.

"Duque *de Cadaval.*

"*Thomas Collins.*"

The plaintiff, at the time of the execution of this agreement, paid 500*l.* to the defendant. The writ was set aside for irregularity by a judge at chambers, on the

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the 30th of *August* 1834. A rule nisi for setting aside the judge's order was obtained by the defendant in this Court, but discharged in *Michaelmas* term 1834; and no steps had since been taken in that action by the defendant against the plaintiff. No evidence was given, at the trial of the present cause, of any debt due from the plaintiff to the defendant; and it was proved that the latter had taken the benefit of the Insolvent Act in 1833, and that his schedule, though of a date later than the greater part of the claims set up by him in his first letter to the plaintiff, made no mention of any such claims. It was objected, for the defendant, that the money had been paid by the plaintiff voluntarily, and under an agreement between the parties, and with full knowledge of the facts, and could not, therefore, be recovered back in this action. The Lord Chief Justice directed the jury to find for the defendant, if they thought that he believed himself entitled to sue the plaintiff in the first action, but otherwise for the plaintiff. The jury found a verdict for the plaintiff, and stated it as their opinion that the defendant knew that he had no claim upon the plaintiff. In *Easter* term 1835, *Platt* obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered, or a new trial had.

Sir *John Campbell*, Attorney-General, *Kelly*, and *Alexander*, who were to have shewn cause, were stopped by the Court.

Platt and *Butt* in support of the rule. The money no longer belongs to the plaintiff. It is not pretended that the plaintiff, when he entered into the agreement,

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was ignorant of the facts. Therefore, if the money was paid as part of the debt claimed, it cannot be recovered back. On the other hand, if it was paid simply until bail should be put in, and as a consideration for the delay, and to abide the event of the suit, the plaintiff, not having put in bail, has not performed his part of the agreement, and cannot claim the money back. Even assuming that he was to receive back the money on putting in bail, he cannot recover till he has performed this, as was done in *M'Neil* v. *Perchard* (*a*). The payment was voluntary; for legal process, even when founded on a claim which cannot be supported, does not constitute that sort of compulsion which avoids a contract. The reason is that the law, which creates the pressure, supplies the defence. This is shewn by *Marriot* v. *Hampton* (*b*), *Knibbs* v. *Hall* (*c*), and *Brown* v. *M'Kinally* (*d*). [*Patteson* J. In *Fulham* v. *Down* (*e*) Lord *Kenyon* qualifies the doctrine; he says, "unless to redeem, or preserve your person or goods."] The principle upon which all these cases have been decided is, that the party who disputes the claim must do so by resisting the action in the first instance; and that there must be some end to litigation. On this principle, if the plaintiff had paid the whole sum claimed, he could not now recover it. *Hamlet* v. *Richardson* (*g*) is to the same effect, though the marginal note there introduces the exception of the case of fraud on the part of the person obtaining the money. No fraud, however, seems to have been in question, in the case itself. The case of *Cobden* v. *Kendrick* (*h*) is there questioned by *Tindal* C. J., and

(*a*) 1 *Esp.* 263.
(*b*) 7 *T. R.* 269.
(*c*) 1 *Esp.* 84.
(*d*) 1 *Esp.* 279.
(*e*) 6 *Esp.* 26. (note).
(*g*) 9 *Bing.* 644.
(*h*) 4 *T. R.* 432. note (*a*).

he

he refers to the judgment of *Holroyd* J. in *Milnes* v. *Duncan* (*a*), which supports the principle now contended for. The same principle was acted on in *Bilbie* v. *Lumley* (*b*) and *Brisbane* v. *Dacres* (*c*). In *Snowdon* v. *Davis* (*d*) a bailiff, by threat of a distress for a sum for which his warrant did not authorise him to distrain, obtained that sum, and afterwards obtained another sum from the same party by distraining upon him under another warrant, which authorised him only to distrain on a different person; and it was held that the party paying might recover back both sums. There the distresses were wrongful throughout; upon which ground that case differs from the present, where the agreement was made by a party under an arrest upon a warrant against that party, and the money paid by the party under such agreement. An action for money had and received has been held to be given where no other remedy lay, as in *Hills* v. *Street* (*e*); but here the plaintiff, if entitled at all, may recover the sum by way of damages in an action for a malicious arrest.

Lord DENMAN C. J. It is asserted that the principle of decision in *Marriot* v. *Hampton* (*g*) has not been adhered to in this case. But that case does not warrant the argument drawn from it. It does not decide that money obtained under the compulsion of legal process can never be recovered back; but only that, after the defence in an action has failed, and money has been recovered in the action, it cannot be recovered back in

(*a*) 6 *B.* & *C.* 679. (*b*) 2 *East*, 469.
(*c*) 5 *Taunt.* 143. (*d*) 1 *Taunt.* 359.
(*e*) 5 *Bing.* 37. See judgment of *Best* C. J. p. 41.
(*g*) 7 *T. R.* 269.

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another action. This is the ground upon which the decision is put by Lord *Kenyon*. He says, "After a recovery by process of law"—not extortion—"there must be an end of litigation." And *Grose* J. says, "It would tend to encourage the grossest negligence if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence." The question there arose, not upon an extortion by legal process, but upon the want of means of defence in a previous action, which means a party ought to have when such action is brought. On the other hand, I certainly felt that there might arise, in this case, an inconvenience from our allowing the plaintiff's claim, since there may be another action for a malicious arrest. After the judgment in this case, there will nevertheless be no bar to that action. We must, however, see whether there be any thing to defeat the plaintiff's right here, if the money be still his. For Mr. *Platt* has put the question in its true form: is it still the plaintiff's money? How is it shewn not to be so? Why, by striving to give effect to a fraud. That is the finding of the jury: the arrest was fraudulent; and the money was parted with under the arrest, to get rid of the pressure. This case differs from all which have been cited as being otherwise decided: in none of those was the bona fides negatived, not even in *Marriott* v. *Hampton* (*a*); for, in default of evidence to the contrary, the party there might have believed the debt to be due. But here the jury find that the defendant did know that he had no claim. The property in the money, therefore, never passed from the plaintiff, who parted

(*a*) 7 *T. R.* 269.

with

with it only to relieve himself from the hardship and inconvenience of a fraudulent arrest.

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LITTLEDALE J. The case of *Marriott* v. *Hampton* (*a*) was different from the present. There the plaintiff in the original action claimed a debt, which the defendant asserted that he had paid, but he could not produce the receipt; and, finding he could not defend, he paid the money and gave a cognovit for the costs. Afterwards he found the receipt; and sued, in order to recover back what he had paid. But, as the money had been originally recovered by legal proceedings, it was held that he could not recover it back as money had and received. That was the ground on which Lord *Kenyon* and *Grose* J. proceeded. They considered that an action did not lie to recover back that which had once been recovered under a legal decision. But here there was no such recovery. The plaintiff was arrested; and the jury find that the arrest was merely colourable: and the money was paid for time to get bail. The arrest must have been merely colourable, since the debt was not inserted in the defendant's schedule. I admit the difficulty which arises from the liability of the defendant to an action for a malicious arrest: no doubt such an action would lie; for, as *Collins* knew that there was no debt, there is distinct malice. Still we cannot prevent the plaintiff from recovering back his money as money had and received.

PATTESON J. I think this verdict was right. I put the matter entirely upon the special circumstances of

(*a*) 7 *T. R.* 269.

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the case. I admit, in general, that money paid under compulsion of law cannot be recovered back as money had and received. And, further, where there is bona fides, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back. But here there is no bona fides, and on that I ground my opinion. When a man sues to recover back money paid under compulsion of law, it lies upon him to shew that there was fraud. Has the plaintiff shewn that here? The jury find that the arrest was fraudulent, in consequence, I suppose, of the debt not appearing in the schedule; for, if such a debt existed, the defendant was bound to insert it in the schedule, under the act of parliament; and the omission of it would have been a misdemeanor severely punishable. The jury, therefore, concluded that the defendant knew that the debt did not exist, and that he used the process colourably. To say that money obtained by such extortion cannot be recovered back, would be monstrous. Then the terms of the agreement form a very strong circumstance. The defendant, having a man in custody for a debt for which he knew that he had no claim, is to get the 500*l.*, whether he recover in the action or not; for there is no provision for the defendant refunding the money in case of his failure. Now suppose the plaintiff had put in bail to the sheriff, instead of entering into this agreement, what would the consequence have been? On application to my Brother *Alderson* the writ was cancelled, though perhaps on a paltry objection; but the result would have been, in the case supposed, that nothing would have got into the pocket of the defendant. It would be a scandal to the law if this money could not be recovered back.

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COLERIDGE J. I quite agree. Although the decisions have gone as far as they can go, yet I will not attempt to disturb them: and they are quite consistent with the decision which we are now giving. It is clear that, if money be paid with full knowledge of facts, it cannot be recovered back. It is clear too that, if there be a bonâ fide legal process, under which money is recovered, although not actually due, it cannot be recovered back, inasmuch as there must be some end to litigation. That is the substance of the decisions. But no case has decided that, when a fraudulent use has been made of legal process, both parties knowing throughout that the money claimed was not due, the party paying under such process is not to have the assistance of the law. If, indeed, the property were changed, it would follow that the plaintiff must fail; but the defendant's counsel assumed that. I rely on the position which is laid down in 1 *Selwyn's Nisi Prius*, 89 (*a*), "If an undue advantage be taken of a person's situation, and money obtained from him by compulsion, such money may be recovered in an action for money had and received." For this, *Astley* v. *Reynolds* (*b*) is cited, in which the circumstances of compulsion were much less strong than in the present case. My opinion, therefore, is founded upon the particular circumstances of the case. When it is said that we are not to look to the degree of hardship, so as to depart from the legal principle, I agree; but here the particular circumstances *make* the law of the case. Here is a foreigner, at a great distance from his friends, at a great distance from *London*, ignorant of the law of *England* (though I do

(*a*) *Assumpsit* II. 8th ed. 1831.

(*b*) 2 *Str.* 915. And see *Morgan* v. *Palmer*, 2 *B.* & *C.* 729.; *Shaw* v. *Woodcock*, 7 *B.* & *C.* 73.

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not rely upon that), charged with owing a very large sum. Then, first, is not the payment compulsory? Next, is there bona fides? According to the finding of the jury, the defendant commits perjury, and uses legal process colourably to enforce an unjust demand. I should have been sorry to find that our hands were tied in such a case.

Rule discharged.

Thursday, April 28th.

TINKLER *against* ROWLAND.

In trespass quare clausum fregit, issues were joined on three pleas: 1st, of a public carriage way; 2dly, of a public bridle way; 3dly, of a public foot way. The jury found a verdict for the plaintiff on the first issue, and for the defendant on the third; and the Judge, without the consent of the plaintiff, discharged the jury from giving a verdict on the second issue.

The Court granted a new trial, although the plaintiff, at the beginning of the trial, had agreed that the damages, if any, should be merely nominal.

TRESPASS, quare clausum fregit. Pleas: 1st, a public carriage way: 2dly, a public bridle way; 3dly, a public foot way. The replication traversed the rights of way, on which the defendant joined issues. On the trial before Lord *Denman* C. J., at the *Surrey Lent* assizes 1835, the counsel for the plaintiff, at the outset, agreed that the damages, if any, should be merely nominal. The jury found a verdict for the plaintiff on the first issue, and for the defendant on the third: but, after having retired for many hours, they told the Lord Chief Justice that they could not agree as to the second issue; and it appeared by the testimony of a medical man that one of the jurymen was ill. Upon this, his Lordship directed the verdict to be taken as above, on the first and third issues, and discharged the jury from giving a verdict on the second, without the consent of the plaintiff. In *Easter* term 1835, *Thesiger*, for the plaintiff, obtained a rule to shew cause why a new trial should not be had.

Channell now shewed cause. The objection, on which the rule was obtained, is, that the Judge has no power, except

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except by consent of parties, to discharge a jury from giving a verdict on one of several issues. That objection is well founded, only where the issue, on which the jury are discharged, is material, as the parties are situated. Now, the only matters left to be determined by the second issue were the damages and the costs of the particular issue (*a*). The damages are here immaterial, because the plaintiff's counsel limited his claim to nominal damages. And, as to the costs of the particular issue, they cannot make such a materiality as would warrant the objection; for that materiality would have existed in every case, as, for instance, in *Powell* v. *Sonnett* (*b*), where, nevertheless, it was held that a jury might be discharged on eight of twenty counts, without the consent of parties, the eight being rendered immaterial by the finding as to the rest. [*Patteson* J. That case, in which I was engaged, is no authority for your position. The Exchequer Chamber there decided, on error brought, that, as it did not appear that the parties had not consented, they would presume that all which ought to have been done had been done.] In replevin and avowry for rent-arrere, if non tenuit and riens in arrere be pleaded, a verdict for the plaintiff in replevin on the non tenuit renders the other immaterial, and the jury should be discharged (*c*). [Lord *Denman* C. J. The question on the second issue here was material as to the right of the parties.] The defendant might make that objection; but the plaintiff cannot.

(*a*) The finding for the defendant on the third issue would have put an end to the question of damages; but the point was raised in argument, as above, to avoid any question as to that finding having been irregular, on account of its being given separately.

(*b*) 3 *Bing.* 381. *S. C.* affirmed in error in the House of Lords, 1 *Bligh, N. S.* 545; where see the judgment of Lord *Lyndhurst*, p. 552.

(*c*) *Cossey* v. *Diggons*, 2 *B. & Ald.* 546.

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The finding of the jury on that issue, even if it were for the plaintiff, would not negative the public right of bridle way hereafter. He could not use such a verdict; and he claimed only nominal damages now.

Per Curiam (*a*). The second issue was material for ascertaining the right. The plaintiff assented to nominal damages, on the understanding that all the issues were to be tried. The issue was material; and, if so, the finding was material.

Rule absolute.

Thesiger was to have argued in support of the rule.

(*a*) Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* J.

Thursday, *April* 28th.

GOODMAN *against* HARVEY and Others.

In giving notice of non-payment to the drawer of a foreign bill, resident abroad, it is sufficient to inform him that the bill has been protested, without sending a copy of the protest.

In an action by the indorsee of a bill who has given value, if his title be disputed on the ground that his indorser obtained the discount of such bill in fraud of the right owner, the question for the jury is, whether the indorsee acted with good faith in taking the bill. The question whether or not he was guilty of gross negligence is improper. Gross negligence may be evidence of mala fides, but is not equivalent to it.

ASSUMPSIT on a bill of exchange drawn by defendants, *September* 1st, 1832, at *Limerick*, upon *Gould*, *Dowie*, and Co. (*London*), for 262*l.* 13*s.* 1*d.*, value in freight per *Cicero*, payable at four months to *John Scott* or order, indorsed by *Scott* to *David Levy*, and by *D. Levy* to plaintiff. The first count alleged non-acceptance; the second, non-payment. Plea (before the new rules), Non Assumpsit. On the trial before Lord *Denman* C. J., at the sittings in *London*, after *Hilary* term 1835, the following facts appeared. The bill was given by the defendants, merchants at *Limerick*, to *Scott*, a ship-owner, for a balance of freight. *Scott* gave

it

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it to *Hudson*, a ship's captain (who gave no value, and whose name did not appear on the bill), to get it discounted. *Hudson* delivered the bill for that purpose to *David Levy*, who caused it to be presented for acceptance on *September* 20th. The drawees refused acceptance, in consequence of having received from the defendants a notice, sent to the latter by a solicitor, warning them not to pay any money to *Scott*, or to any other person on his account, as the party giving the notice was about forthwith to sue out a commission of bankrupt against him, on the petition of certain persons named in the notice (*a*). The drawees gave this communication (the receipt of which was proved at the trial) as their reason for not accepting. The bill was noted for non-acceptance, and protested. No notice of the non-acceptance was given to the defendants. *Levy* returned the bill to *Hudson*, who, in the latter part of *October*, carried it back to *Scott*. *Scott*, who had by that time been arrested for debt, gave the bill to *Hudson* again, in order that he might once more endeavour to raise money by discounting it; and *Hudson* undertook to do so. *Hudson* again placed the bill in the hands of *Levy*; and he got it discounted by the plaintiff, who paid about 260*l.* upon it. *Levy* never remitted the proceeds, but, as was represented at the trial, retained them in fraud of *Scott*; and no value was ever given for the bill by either *Levy* or *Hudson*. When the bill became due, the plaintiff presented it for payment, which *Gould*, *Dowie*, and Co. refused, although they had funds, the right to the proceeds being contested. They were

(*a*) The commission did afterwards issue, on a fiat dated *January* 15th 1833, and this action was understood to be defended by *Scott*'s assignees.

furnished

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furnished with funds a day or two before the bill became due, but had not funds at the time of the non-acceptance. The bill was protested for non-payment; and notice of the non-payment was sent to the defendants by letter, stating that the bill had been protested as last mentioned, but not inclosing a copy of the protest. For the defendants it was objected, first, that the letter ought to have contained a copy of the protest, which objection the Lord Chief Justice overruled; and, secondly, that the plaintiff, in taking the bill from *Levy* with the notarial marks upon it, had been guilty of gross negligence, and therefore took the bill with all its vices, and could have no better right to recover upon it than *Levy* himself, who clearly would have had none. The Lord Chief Justice was of this opinion, and observed that the plaintiff had received the bill with a death-wound apparent on it; and he proposed to the plaintiff's counsel either a nonsuit, or that the case should go to the jury on the question whether or not the plaintiff had been guilty of gross negligence. The jury, in answer to a question from the Lord Chief Justice, said that, in their opinion, the notary's marks on the bill were sufficient notice to an indorsee of non-acceptance. A nonsuit was then taken; and in the next term *Erle* moved for a new trial, on the ground that the above ruling against the plaintiff was incorrect; that the bill had been lawfully sent into the market by *Scott*, while not yet due; and that the plaintiff, who had taken it before maturity, and given value for it, had a right to recover the amount, notwithstanding any defect in the title of an intermediate party. A rule nisi was granted.

Sir

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Sir *John Campbell*, Attorney-General, and *Mellor*, now shewed cause. Independently of the objection which prevailed, the plaintiff ought not to have recovered, first, because the defendants had no proper notice of the refusal to accept. A holder, knowing that the bill has been dishonoured by non-acceptance, is bound to give notice of it to the drawer, as admitted by all the Judges in *O'Keefe* v. *Dunn* (*a*). Here the notarial marks afforded such knowledge to any holder. The object of the notice to the drawer is that, if he has funds in the hands of the drawee, he may remove them; and here the defendants had funds in the hands of *Gould*, *Dowie*, and Co. before the bill became due. Secondly, no regular notice of the non-payment was given, because the letter communicating that fact did not furnish any copy of the protest. This was a foreign bill, being drawn in *Ireland*, *Mahoney* v. *Ashlin* (*b*). And, where the indorsee of a bill, drawn in the *West Indies*, payable in *London* at sixty days' sight, noted it for non-acceptance, and at the end of sixty days protested it for non-payment, and then wrote to the drawer, in the *West Indies*, acquainting him that the bill was not accepted, it was held that the indorsee, "by not sending the protest for non-acceptance," had "made himself liable;" *Goostrey* v. *Mead* (*c*). Where notice, without a copy of the protest, has been held sufficient, the party receiving the notice was resident in *England* at the time. [*Patteson* J. referred to *Cromwell* v. *Hynson* (*d*), and Lord *Denman* C. J. to *Robins* v.

(*a*) 6 *Taunt.* 305. Affirmed on error, *Dunn* v. *O'Keeffe*, 5 *M. & S.* 282.
(*b*) 2 *B. & Ad.* 478.
(*c*) *Bull. N. P.* 271, 2. 1 *Selw. N. P.* 397. 8th ed.
(*d*) 2 *Esp. N. P. C.* 511.

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Gibson (*a*)). The observation as to residence applies to the latter case, if not to both; and, in the first, the reasons of Lord *Kenyon*'s ruling are not stated. In *Chaters* v. *Bell* (*b*), where it was held that, if a foreign bill were regularly presented and noted, protest might be made at any time before action brought, the Court, after argument, recommended a special verdict, but the recommendation was never acted upon (*c*). [*Coleridge* J. A very good book, after stating the decisions in *Cromwell* v. *Hynson* (*d*) and *Goostrey* v. *Mead* (*e*), observes (*g*) of the latter, "The only way in which this case can be reconciled with Lord *Kenyon*'s decision is, by considering the expressions used in the latter case, 'not sending the protest,' as meaning nothing more than 'not giving notice of the non-acceptance.'" Then, as to the other point; the plaintiff, although he gave value for the bill, was not entitled to recover; in the first place, because he took the bill after it had been noted for non-acceptance, and no distinction is to be drawn between a bill noted for non-acceptance, and one dishonoured by non-payment; per *Bayley* J. in *Crossley* v. *Ham* (*h*): he took it, therefore, subject to all infirmities which would have attended it in the hands of *Hudson*; and *Hudson* could not have recovered upon it, having given no value. Secondly, even if the plaintiff had taken the bill without notice of dishonour, yet, as it had been indorsed in fraud of the proprietor *Scott*, the plaintiff could only have recovered on shewing that he was a bonâ fide holder for value.

(*a*) 3 *Camp.* 334. *S. C.* in Banc. 1 *M.* & *S.* 288.
(*b*) 4 *Esp.* 48.
(*c*) 1 *Selw. N. P.* 361. 8th ed.
(*d*) 2 *Esp. N. P. C.* 511.
(*e*) *Bull. N. P.* 271, 272.
(*g*) 1 *Selw. N. P.* 337. 8th ed.
(*h*) 13 *East*, 502.

Now,

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Now, although it can no longer be maintained as law that the holder of a bill is disabled from recovering it if he has taken it under circumstances which might reasonably have awakened suspicion, the present is a case of gross negligence; and such negligence has so far the effect of fraud, that the holder who has been guilty of it can have no better title than the party from whom he takes.

Erle, contrà. The first point was not taken at the trial; and the facts proved shewed that the notice could not be necessary. Secondly, assuming it to be requisite that notice should be given of protest as well as non-payment, it is sufficient if the letter communicating the non-payment states that there has been a protest. In *Bayley on Bills* (*a*), speaking of protest and notice of dishonour in the case of a foreign bill, the author merely says, "*In some cases* a copy, or some other memorial of it" (the protest), "should accompany the notice." [Lord *Denman* C. J. We have no doubt that the notice here was sufficient]. Then, thirdly, as to the plaintiff's title as holder. No objection is made to it, except that his taking the bill with the notarial marks on it is supposed to shew gross negligence. In *O'Keefe* v. *Dunn* (*b*) it was held that the indorsee of a bill which, in the hands of his indorser, had been refused acceptance, no notice of such refusal having been given to the drawers, might nevertheless recover upon the bill provided he took the indorsement without knowledge of

(*a*) Page 259. 5th ed.

(*b*) 6 *Taunt.* 305. Affirmed on error, *Dunn* v. *O'Keeffe*, 5 *M.* & *S.* 282.

the

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the previous dishonour. Here, if the plaintiff knew of the dishonour, the distinction taken in that case might, under ordinary circumstances, be available against him. But that distinction is important only where notice to the drawer was necessary in the first instance. Here it was not; for it must be implied, from the communication made to *Gould, Dowie* and Co. by the defendants, that the non-acceptance was within their knowledge. Then, notwithstanding the notarial marks, the bill was as if it had never been presented for acceptance. [*Littledale* J. As far as regards notice]. *Scott*, [then, had a good cause of action against the defendants after the non-acceptance, and might transfer that right to his indorsee. Any ground of complaint as between *Scott* and the parties to whom he had transferred it before it reached the plaintiff, cannot affect the plaintiff's right. The only question is, whether the plaintiff acted bonâ fide in discounting it. (He was then stopped by the Court.)

Lord DENMAN C. J. The question I offered to submit to the jury was whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer, where the party has given consideration for the bill. Gross negligence may be evidence of mala fides, but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title. The evidence in this case as to the notarial marks could only weigh as rendering it less likely that the bill should have

have been taken in perfect good faith (*a*). The rule must be absolute. 1836.

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LITTLEDALE, PATTESON, and COLERIDGE, Js. concurred.

Rule absolute.

(*a*) See *Willis* v. *The Bank of England*, antè, p. 32.

WALLISS *against* BROADBENT and ROBINSON.

Friday, April 29th.

ASSUMPSIT. The declaration stated that *Elizabeth Elridge*, being seised in fee of a certain messuage and premises, on the 1st of *November* 1820, by articles of agreement between her on the one part, and the defendants on the other part, agreed to demise the messuages and premises to them, to hold from the 11th of *October* then last, at the rent of 63*l.*, on certain conditions set out in the declaration, relating to the repair and management of the demised property by the defendants, and the state in which it was to be left; the agreement to continue in force for one year from the said 11th of *October*, and so on from year to year, as long as both parties should agree upon the terms and conditions therein specified, unless six months' notice in writing should be given by one party to the other, in which case the demise should cease from the 11th of *October* next after the delivery of such notice: the declaration then averred that the defendants entered, and enjoyed as tenants to *Elizabeth Elridge*, under the agreement, till her death; and that she, in the lifetime

Declaration, in assumpsit, that defendant had held lands under a lease from *E.*, on certain terms, which were set forth on the record; that the reversion came to plaintiff; and that defendant, in consideration of an alteration of the rent, promised to hold of plaintiff on the same terms in all other respects; but that defendant broke the terms. Plea, Non Assumpsit. Plaintiff not having proved an express contract to hold of defendant on the old terms, Held, that he could not rely upon an implied contract, arising from the old lease, without putting it in evidence; and that the old lease could not be used as such evidence, unless properly stamped.

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of one *Henry Bell* since deceased, duly devised the messuage and premises to *Bell* and the plaintiff in fee, and died seised of the reversion in fee, 1st of *February* 1823; that *Bell* and the plaintiff thereupon became seised of the reversion in fee, and continued so seised till *Bell*'s death: that, on the 11th of *October* 1825, in consideration that *Bell* and the plaintiff, at the special &c., would permit the defendants to hold and enjoy the messuage and premises, at the rent of 60*l*., upon all other the terms and conditions before mentioned, the defendants promised to abide by, observe, and perform all other the said terms and conditions, according to the agreement: it was then averred that the defendants did so hold and enjoy by permission of *Bell* and the plaintiff during *Bell*'s life, and since his death by permission of the plaintiff, till the 11th of *October* 1834, when the term ended and determined: the declaration then set out breaches of the conditions committed before and after the death of *Bell*. *Broadbent* pleaded non-assumpsit, on which issue was joined; and *Robinson* suffered judgment by default. On the trial before *Tindal* C. J., at the *Leicester* Spring assizes, 1835, the plaintiff offered in evidence the alleged agreement: but it was objected to and held inadmissible, on the ground that it amounted to a lease, but had no lease stamp. The only other evidence offered, of the contract between the plaintiff and the defendants, was an express agreement, between *Broadbent* and the plaintiff's agent, that the rent should be raised fron 55*l*. to 60*l*., in consideration that the defendants should be permitted to plough up certain lands. The defendants' counsel objected, first that there was no evidence to prove upon what terms they had held the premises; and, secondly,

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condly, that, as it did not appear that *Robinson*, who was originally a mere surety for *Broadbent*, was in any manner a party to the alleged new agreement by parol, there was no proof of a joint contract. The Lord Chief Justice held both objections to be fatal, and nonsuited the plaintiffs, but reserved leave to move to enter a verdict for such damages as the jury should assess. The jury found 70*l.* damages. In *Easter* term 1835, *N. R. Clarke* obtained a rule to shew cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff with 70*l.* damages.

Miller now shewed cause, and was directed to confine himself, in the first instance, to the first point. The contract laid in the declaration was not proved. There is no pretence for saying that an express contract to hold on the terms of the old lease, or on any terms except as to the amount of rent, was shewn; and the implied contract cannot be raised without producing the old lease. This would have been necessary before the rules of *H.* 4 *W.* 4.; and, by these rules, *Pleadings in particular Actions*, I. *Assumpsit* (*a*), it is ordered that "the plea of non assumpsit shall operate only as a denial in fact of the *express* contract or promise alleged, *or of the matters of fact from which the contract or promise alleged may be implied by law.*" Now here, there being no express contract or promise to hold according to the terms of the old lease, such promise can only be implied from the fact of the defendants having previously held under such lease. The existence, therefore, of such lease being one of the facts from which the im-

(*a*) 5 *B.* & *Ad.* vii.

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plied contract or promise was to be raised, it became necessary, according to the terms of the rule of Court, that such fact should be proved. The mere averment of the existence of the lease or agreement, with a recital of its terms, in the declaration, was not sufficient, because the plea required that it should be in evidence. Then, it being necessary to prove it, that could only be done by the production of the instrument; which, however, was inadmissible for want of a proper stamp. There was, therefore, no proof at all of the existence of the lease and previous holding under it. (He was here stopped by the Court.)

Humphrey and *Bayley* contrà. The existence and execution of the lease were not in issue on this record; they were mere matter of inducement, and were as much admitted by the plea as the death of Mrs. *Elridge*. Even before the new rules it was held, in an action against a tenant for breach of agreement as to his management of a farm, that the averment of the estate of the lessor was an immaterial averment, and that a variance as to that was unimportant; *Winn* v. *White* (*a*). [*Patteson* J. It does not appear, from that case, that it would not have been necessary to prove some title in the landlord.] In *Jones* v. *Brown* (*b*) the defendants, in an action of trespass for taking goods, justified upon an alleged property in themselves, as assignees of a bankrupt; and the plaintiff joined issue on the question of property in the defendants: and it was held that this was an admission of the bankruptcy, and of the defendants being assignees. In *Barnett* v. *Glossop* (*c*) it was held

(*a*) 2 *W. Bl.* 840. (*b*) 1 *New Ca.* 484.
(*c*) 1 *New Ca.* 633.

that,

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that, where non assumpsit only was pleaded to an action upon the bargain and sale of a copyright, it was not open to the defendant to object that the assignment was not in writing: that must have been on the principle that the assignment was mere inducement. In *Frankum* v. *The Earl of Falmouth* (*a*) the declaration, in case, stated that the plaintiff was possessed of a mill, and by reason thereof was entitled to the use of a stream for the mill, and that the defendant had wrongfully and injuriously diverted the stream; and it was held that a plea of Not Guilty put in issue nothing but the fact of the diversion.

Lord DENMAN C. J. It is clear that the new rules do not dispense with the necessity of proving the original agreement. The promise laid in the declaration is, to abide by, observe, and perform all the terms and conditions of that agreement, except as to the rent; and the defendant says, I made no such promise. How is the Plaintiff to prove his case on this issue? He must prove the fact of the promise, or he must prove facts from which the promise may be implied. This view of the case cannot be varied by calling the original agreement matter of inducement.

LITTLEDALE J. I am of the same opinion. I think that the terms of the original agreement were put in issue, there being no proof of an express promise. Nothing was proved except the alteration as to the amount of rent; it was not shewn to what that applied, but merely that this alteration was the result of an agreement by

(*a*) 2 *A.* & *E.* 452.

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the defendants while they were in possession of the premises. To shew what the old terms were, the agreement containing the terms must be proved. The Defendant says that, under the new rules, this proof is dispensed with. Now, here, there is no express promise proved; but it is sought to imply one, by law, from the terms of the old holding. That, therefore, is precisely within the terms of the rule, which says that the plea of Non Assumpsit puts in issue the matter of fact from which the contract or promise alleged may be implied by law. It was therefore necessary to prove the original agreement; and that, not being properly stamped, was not admissible.

PATTESON J. It seems to me that this nonsuit was right on the particular evidence given. A contract is declared on, and issue is joined on the fact of the contract. Of the contract itself there is no evidence; only evidence is given, that at one time the parties, then holding at a rent of 55*l.*, agreed that the rent should be raised to 60*l.*; and that this took place upon an application respecting the ploughing of certain land. We clearly cannot go upon that. The contract, then, upon which the plaintiff is to proceed, arises from the change in the situation of the landlord. There is no evidence of an express agreement; the plaintiff, therefore, relies upon an implied agreement. That being so, the plea of non assumpsit denies all matter of fact from which the agreement is to be implied. It denies, therefore, the original agreement; and the plaintiff has to prove this, in order that he may raise the implication that the contract was to go on upon all the old terms except those relating to the rent. The common case is that, where

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where a lease expires, the acceptance of rent raises an implication by law that the holding on is upon the old terms: and this is what the plaintiff relies upon. But then he must prove the facts. I do not say that, if proof had been given of an express contract to hold on the old terms, with an alteration of rent, there would not be enough proof of the old terms in this case; the inclination of my mind at present is, that it would be so. But here there is no such express contract proved.

COLERIDGE J. I am of the same opinion, upon the ground taken by my brother *Patteson*. I do not wish to be bound to an assertion that, if there had been proof of an express promise to hold upon the terms contained in the original instrument, the mere production of the instrument without proof of the execution or stamp might not be sufficient. But here the promise relied upon is an implied one; and that makes it necessary to prove every thing from which the promise is to be implied. There are other objections as to the sufficiency of proof; but into these I will not enter.

Rule discharged (*a*).

(*a*) See *Richardson* v. *Gifford*, 1 *A. & E.* 52.

Saturday, April 30th.

WANSBROUGH and Another *against* MATON.

A tenant is entitled, at the expiration of his term, to remove a wooden barn which he has erected on a foundation of brick and stone, the foundation being let into the ground, but the barn resting upon it by weight alone.

He may maintain trover for such a barn, against a party converting it.

If the reversioner, having refused, while off the premises, to allow such tenant to take away the barn, afterwards, while a third party is in possession of the land, come on the land and prevent the tenant from entering to take the barn away, this is a conversion by the reversioner.

TROVER for two barns, 1000 planks of wood, 1000 rafters, 1000 joists, and for iron, stones, bricks, &c. First plea, Not Guilty; second plea, that plaintiff was not lawfully possessed, &c. Issue on both pleas. On the trial before *Gurney* B., at the *Salisbury Easter* assizes, 1835, it appeared that the plaintiffs held some land as tenants to the defendant for a term of years determinable on lives. On the expiration of the last life, the plaintiffs quitted possession, and the defendant demised the land to a new tenant, who entered. When the plaintiffs quitted, they left on the land a barn (called a stavel barn) which they had erected, and for which the action was brought. It consisted of wood, resting on, but not fastened by mortar or otherwise to, the caps of blocks of stone (called stavels or staddels) fixed into the ground or let into brickwork, the brickwork being built on and let into the ground in those parts where the ground was lowest, for the purpose of making an even foundation for the barn to rest upon. The wooden barn could be taken away without injury to the rest. It is usual, in the part of the country where the barn stood, for tenants, who have built such barns, to remove them on quitting, or to have them valued to the incoming tenants. The plaintiffs, after the new tenant had entered, demanded the barn of the defendant, off the premises; the defendant said that they should not have it till they had agreed with him as to another matter in dispute: and they afterwards

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wards sent men to bring it away; but the defendant, being then on the premises, ordered the men to leave the ground, and locked the gates after them. Upon this evidence the defendant's counsel applied for a nonsuit, on the grounds, first, that the barn was a fixture, for which trover would not lie; and, secondly, that no conversion was proved. The learned Judge refused to nonsuit, but reserved liberty to move to enter a nonsuit on both points.

In *Easter* term 1835 (*April* 23d) (*a*), *Merewether* Serjt. moved accordingly. There was no conversion. If the plaintiffs chose to leave any moveable chattel on the land, they had no right afterwards to enter for the purpose of taking it away. The defendant was not the person in occupation. And this was no fixture.

The Court refused the rule on the point of the conversion, but granted it on the other point.

Erle now shewed cause. The barn was a chattel, inasmuch as it was not affixed to the freehold, either naturally or artificially, so as to be not removable without injury to the freehold. The stones and the brick work could not indeed be removed: but the barn, which is merely a loose fabric of wood, might be taken away, and the fixed stand of brick and stone be left uninjured. In 11 *Vin. Abridg.* 154, *Executors* (U) pl. 74., it is said, "*A granary built on pillars* in *Hampshire* is a chattel, and goes to the executors, and may be recovered in trover. This shall be understood according to the custom of the country; coram *Eyre*

(*a*) Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

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WAKEBOUGH against MAYOR.

Ch. B. *Summer* assizes 1724, apud *Winchester*." In the present case evidence was given to shew the understanding of the country to be that such barns are removable. The cases are collected in *Amos* and *Ferard's Law of Fixtures*, p. 243. part II. ch. 1. s. 3. One of the latest cases is *Davis* v. *Jones* (*a*), where it was held that trover would lie for jibs, which could be taken out of machinery without injuring it or the building in which it was erected, and which had been left on the premises by outgoing tenants; though it was held that the actio would not have lain, if the jibs had been removeable solely on the ground of the privilege of trade. That case is indeed rather less strong than the present; as there the jibs could not be removed without injury to themselves. In *Penton* v. *Robart* (*b*) a similar decision was given as to buildings; though it is true that the ground of that decision was, in part, the privilege of trade. In *Elwes* v. *Maw* (*c*) farm buildings were held not to be removable: but they were fixed to the freehold, and could not be removed without injuring it.

Merewether Serjt., and *W. M. Manning* contrà. In *Elwes* v. *Maw* (*c*) it was laid down that the case of buildings for trade was an exception, and Lord *Ellenborough* said that to extend the rule in favour of tenants, as was proposed, would be "to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlords and tenants" (*d*). The attempt there was to apply the exception to buildings fixed for the purpose of agricultural occupation. *Davis* v. *Jones* (*a*) and *Penton* v. *Robart* (*b*) are also cases where

(*a*) 2 *B.* & *Ald.* 165.
(*b*) 2 *East*, 88.
(*c*) 3 *East*, 38.
(*d*) Page 57.

the

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WAKEHOUSE against MATON.

the fixtures were erected for the purpose of trade. In *Culling* v. *Tuffnal* (*a*) it was held (as in the case cited on the other side from *Viner*,) that trover might be supported for a barn put on pattens and blocks lying on the ground, but not fixed in or to the ground, the custom of the country being to erect barns in this way, and carry them away at the end of the term. But this case is explained by Lord *Ellenborough*, in *Elwes* v. *Maw* (*b*), to be justifiable, independently of the custom, by the circumstance that the pattens and blocks were themselves not fixed. Here the foundation of brick-work and stone is let into the ground: the free-hold is therefore interfered with; this foundation is a fixture which cannot be removed without injuring the freehold, and is thus an irremovable fixture. The question therefore is, whether the upper part of a building can be separated from the foundation. To hold that it can, would be to allow a roof, or any part of a building, which is connected with the lower part merely by pressure, to be separable from the rest. Many buildings have the upper and lower parts connected merely by gravitation. A landlord is not to have a foundation made in his freehold, and then the rest of the building taken away, for which alone the foundation is valuable. [*Patteson* J. In *Rex* v. *Otley* (*c*) it was held that a wooden mill, resting by mere weight upon a foundation of brick, was not part of the freehold, so as to contribute to the value of a tenement on a question of settlement. Lord *Denman* C. J. Suppose the barn in this case had been placed upon a yard paved with stones.] Such a barn might be taken away. The

(*a*) *Bull. N. P.* 34. (*b*) 3 *East*, 55.
(*c*) 1 *B. & Ad.* 161. See *Steward* v. *Lombe*, 1 *B. & B.* 506.

true

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WAREBOUGH against MATON.

true principle seems to be that, if the whole building be erected, one part with a view to the other, it is an entire inseparable structure; and that, if one part be placed on a lower part, previously existing and belonging to the landlord, the two may be separated. The degree in which the realty is interfered with cannot determine the question. If, by the nature of the building, the several parts have always constituted a whole, they cannot be separated.

Lord DENMAN C. J. Questions as to fixtures generally arise between the primâ facie right of the landlord on the one hand, and exceptions in favour of trade or of tenants on the other. Any general rule is liable to exception. But the first question must be, whether the erection be a part of the freehold. If it be not united to the freehold, we cannot say that it is a part of it; and here it is not so united, and therefore not a fixture. Were we to hold otherwise, we should over-rule the decision in *Rex* v. *Otley* (*a*), where such a building was held to be removeable, and no part of the tenement.

LITTLEDALE J. The barn consists of nothing but the timber, and is not attached to the stone or brickwork. Perhaps the tenant might not have been entitled to dig into the ground for the purpose of making these foundations, and might be liable in damages for so doing. But, having so done, he places the barn on the stone caps, not fixing any thing to the freehold. Therefore, in removing the barn, he does not disturb the freehold. A tenant may require barns of different kinds; he might take away this building, and substitute, for instance, a

(*a*) 1 *B.* & *Ad.* 161.

fowl

fowl house, keeping always the same foundation in order to insure a level surface. Suppose holes were made in the wooden part, or grooves constructed, so as to fix the barn on to the foundation, I do not know that the barn, if so fixed, might not be removed, since it could be done without injuring the freehold. But that it is not necessary to decide; for here there is nothing of the kind, the barn being kept in its place merely by weight. The foundation must remain: if that be injured, the landlord may maintain an action.

PATTESON J. I cannot distinguish this case from *Rex* v. *Otley* (*a*). It was decided there that the wooden mill, resting by its weight on a brick foundation, was not annexed to the freehold. And that was a strong case; for the mill and ground had been demised together by the same person to the pauper. Yet it was held that the mill did not constitute a part of the tenement so as to make up the annual value of 10*l*.

COLERIDGE J. In the absence of exception by custom, or in favour of trade, the rule is clear. The tenant has no right to remove the whole or any part of what is fixed to the freehold. The question therefore is, What is fixed? That is, in the present case, What does the barn consist of? Does it include the stone caps, or merely the wood work? I apprehend that the wood work is the whole barn. That wooden barn is supported by mere pressure. And this meets the argument suggested as to the criterion being whether one part of the building be erected with a view to the other.

Rule discharged.

(*a*) 1 *B. & Ad.* 161.

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Saturday, April 30th.

LAWSON *against* LANGLEY.

To support a plea (framed on stat. 2 & 3 *W.* 4. *c.* 71. *s.* 2.) of a right of way enjoyed for forty years, evidence may be given of user more than forty years back.

TRESPASS. The first count was for breaking and entering plaintiff's close; the second count, for laying mortar &c. upon it. Pleas: 1st, Not Guilty; 2d, As to the breaking and entering, that defendant was occupier of a workshop, &c.; and that the occupiers for the time being of the said workshop, &c., for the full period of forty years next before the commencement of this suit, have actually, and as of right, and without interruption, enjoyed, and defendant, as such occupier of the said workshop, &c., still of right ought to enjoy without interruption, a certain &c. (justifying in right of a foot and horse way). Replication, traversing the enjoyment as of right as alleged. Issues were joined on these pleas. On the trial before *Littledale* J., at the Spring assizes for the county of *Rutland*, in 1835, the plaintiff began, and offered evidence to shew that, at periods both within and beyond forty years from the commencement of this action, the way in question had not been enjoyed. The evidence beyond forty years was objected to, and excluded. The defendant's counsel afterwards offered evidence of user: but, on his proposing to carry this fifty years back, it was objected that, consistently with the ruling which had already taken place, the defendant could not, on the issue joined upon the second plea, and under stat. 2 & 3 *W.* 4. *c.* 71. *s.* 2., extend his proof beyond the forty years. In reply, it was contended that the evidence was admissible, either as substantive proof for the defendant, or in contradiction to the plaintiff's case. The learned Judge rejected the evidence, doubting at the same time

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time whether that on behalf of the plaintiff, going more than forty years back, ought not to have been received. The plaintiff had a verdict on the second plea. In the next term *Adams* Serjt. obtained a rule nisi for a new trial, on the ground, among others, of the above rejection of evidence. The learned Judge's report being now read,

Lord DENMAN C. J. said, Surely the user fifty years ago was some evidence as to the state of things at the distance of forty. Indeed I should think that proof as to the user of the road at any time could scarcely be excluded; though, if it went no farther than to shew what had taken place at a very distant period, it would amount to nothing. However, it is sufficient to decide on points as they come before us. I think the rule must be absolute.

LITTLEDALE J. If evidence of user beyond forty years were to be excluded, it might be that, after the case had been established as far as thirty-eight years back, a discontinuance of proof might occur as to the two or three preceding years, and the party might fail because he was unable to carry his case on without going to the distance of forty-one. I think the evidence of user more than forty years back was admissible.

PATTESON and COLERIDGE Js. concurred.

Rule absolute.

Humfrey and *G. T. White* were to have opposed the rule, but did not argue, the opinion of the Court being decided on the point. *Adams* Serjt. and *N. R. Clarke* were to have supported the rule.

Saturday, April 30th.

HAINE *against* DAVEY and Another.

Under stat. 3 & 4 *W.* 4. *c.* 42. *s.* 1. (which provides that the contemplated rules of pleading shall not disable any person from pleading the general issue and giving the special matter in evidence, where by statute he may now do so), an overseer, sued in trespass for taking *A.*'s goods, may still prove, on plea of Not Guilty, that he, as overseer, distrained the goods for a poor's rate due from *B.*, and that they were *B.*'s, not *A.*'s. The general issue does not, under the rules of *Hil.* 4 *W.* 4., confine him to proof of his character of overseer.

The practice of not granting a new trial on the ground that the verdict was against evidence, if the amount claimed fall short of 20*l.*, applies to motions made by plaintiff, as well as motions by defendant.

But where the ground is misdirection, the amount is not regarded. And, where the Judge had misdirected the jury by submitting for their consideration a fact not proved nor deducible from the evidence, the Court granted a new trial, though the amount in question was less than 1*l.*

TRESPASS for taking a horse, harness, and other goods of plaintiff, and converting them, &c. Plea (*December* 13, 1834), Not Guilty. On the trial before *Gurney* B. at the *Launceston* Spring assizes 1835, it appeared that the plaintiff claimed the goods (with the exception of the harness), as having bought them at a sale made by the sheriff under an alleged execution against the goods of one *Read*. The defendants, as overseers of the poor, had afterwards distrained all the goods in question as *Read*'s, for arrears of poor's rate, and they gave this justification in evidence, under stat. 43 *Eliz. c.* 2. *s.* 19. (*a*), alleging that the sale to the plaintiff had been collusive and fraudulent, and that the property remained in *Read*. For the plaintiff it was

(*a*) Stat. 43 *Eliz. c.* 2. *s.* 19. enacts, "That if any action of trespass or other suit shall happen to be attempted and brought against any person or persons for taking of any distress," &c., "or any other thing doing, by authority of this present act, the defendant or defendants in any such action or suit shall and may either plead not guilty, or otherwise make avowry," &c. alleging in such avowry, &c.; to which avowry the plaintiff shall be admitted to reply, &c. (de injuriâ): "Whereupon the issue in every such action shall be joined, to be tried by verdict of twelve men, and not otherwise, as is accustomed in other personal actions: and upon the trial of that issue, the whole matter to be given on both parties in evidence, according to the very truth of the same." The act gives treble damages, with costs, in case of a nonsuit, or verdict for defendant.

contended

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HAINE against DAVEY.

contended that this defence ought to have been specially pleaded under the rule of *Hil.* 4 *W.* 4., tit. *Pleadings in particular Actions*, V. 3. (*a*), that "in actions of trespass de bonis asportatis, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein;" and that the evidence now offered was not let in by the proviso of stat. 3 & 4 *W.* 4. *c.* 42. *s.* 1. (under which those rules were made), enacting "that no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case wherein he is now or hereafter shall be entitled to do so by virtue of any act of parliament now or hereafter to be in force." It was argued that the statute saved the right of giving the special matter in evidence under the general issue so far, that officers might still prove under that plea the character and authority in respect of which they justified, but not that they might disprove the plaintiff's right to the goods, without pleading specially in denial of it. The learned Judge over-ruled the objection. It was proved that the harness was upon the horse at the time of the seizure; and both were taken together; what had become of the harness afterwards did not appear. There was no evidence to shew that it was not the plaintiff's. Its value was about nine or ten shillings. The learned Judge desired the jury to say, as to the rest of the goods, whether the sale was fraudulent or not: and, as to the harness, he put it to them whether the defendants took this away with the horse, or whether

(*a*) 5 *B.* & *Ad.* x.

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they might not have left it on the premises. The jury found a verdict for the defendants. In the next term, *Erle* obtained a rule to shew cause why there should not be a new trial, the grounds being the improper reception of evidence, misdirection, and that the verdict was against evidence.

Bompas, Serjt. and *W. M. Manning* now shewed cause. Since the new rules a party may still give the special matter in evidence under the general issue, wherever he was formerly entitled to do so. The words of stat. 43 *Eliz. c.* 2. *s.* 19. are quite general; and there is no authority to shew that, under that section, any matter in bar may not now be proved on a plea of the general issue, as it might have been before. As was observed by *Patteson* J., on the motion in this case, the question here is not simply one of property. [*Patteson* J. I thought the test was this: would the character in which the party justifies have been a sufficient defence of itself, before the new rules? If it would not, the act must have contemplated something more than the proof of that character merely, or the provision must be useless in a case like the present. *Coleridge* J. It might, however, be asked, where the dispute was as to property in the goods, whether the party was indebted to the statute of *Elizabeth* for his right of contesting that point under the general issue. If not, does the saving clause of stat. 3 & 4 *W.* 4. *c.* 42. *s.* 1. apply? Lord *Denman* C. J. If the defendants could prove that the goods were not the plaintiff's property, they did not want that statute to enable them to prove such a defence under a plea of not guilty.] The words of stat. 3 & 4 *W.* 4. *c.* 42. *s.* 1. are, that a party shall not be deprived of the power of pleading the general issue *in any*

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any case wherein he is now entitled to do so by any act now in force. If the legislature had meant to confine this exception to the special matter by which particular persons, as such, were to be justified under a statute, the clause would have been worded accordingly. The meaning is, that any of the statutes referred to shall have the full effect which it would formerly have had, notwithstanding the new rules. In *Wells* v. *Ody* (*a*) it was held that, since the new rules, a defendant having raised what he alleged to be a party wall might still make his full defence under the Building Act, 14 *G.* 3. *c.* 78. *s.* 43., denying the plaintiff's exclusive property in the wall, though he had pleaded only the general issue as permitted by *s.* 100. of that Act. With respect to the harness, the taking of it has been negatived by the jury; and there was no evidence of its having been in the actual possession of the defendants. And, at any rate, as the value is below 20*l.*, the Court will not grant a new trial. [Lord *Denman* C. J. As to the general issue, it certainly occurred to me, at first, that the statute 3 & 4 *W.* 4. *c.* 42. *s.* 1. only saved the necessity of pleading such matter as must have been specially pleaded if it had not been for some former statute. But the words of stat. 43 *Eliz. c.* 2. *s.* 19. are very general; and I think it will be difficult for the plaintiff to get over them.]

Erle and *Butt*, contrà. Supposing the Court to be of opinion that the whole defence in question is still let in under the new rules, and that, according to the wide language of the statute of *Elizabeth*, the matter relied upon by the defendant, including that which is totally

(*a*) 7 *Carr.* & *P.* 22. And see *S. C.* 2 *C. M.* & *R.* 128. *S. C.* 5 *Tyrwh.* 725.

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independent of his character of overseer, may be proved under the general issue, the plaintiff lies under this difficulty, that he cannot anticipate from the plea whether or not the property will be disputed; and the Court, therefore, will more readily grant a new trial, if the direction of the learned Judge, on this part of the case, has been too unfavourable to him. (They then insisted upon an alleged misdirection as to this part of the case, which it is unnecessary to notice further.) With respect to the harness, it was proved to have been in the plaintiff's possession, and to have been upon the horse when seized; if it was kept for ever so short a time, there was a trespass in respect of it. No proof was given of its being returned, nor any question asked on the subject in cross-examination. The learned Judge, therefore, was not authorised in putting to the jury the supposition that it was slipped off and left on the premises. The rule, that a new trial will not be granted where the verdict is for less than 20*l.*, ought not to apply where there is a wrongful verdict for the defendant. The plaintiff ought to recover what he rightfully claims, however small the amount may be. At all events, the rule must be confined to the case where he moves on the ground that the verdict is against evidence: in that case he would have to pay costs, and the Court takes it into consideration that the costs would be greater than the amount to be recovered. Here the motion is made not only on the evidence but for misdirection. [Lord *Denman* C. J. The rule clearly does not apply where the ground is misdirection. *Coleridge* J. If the motion is made on the evidence, the rule extends to a verdict for the defendant as well as for the plaintiff.]

Lord

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Lord DENMAN C. J. On the first point, the doubts I had entertained have been removed. I think the learned judge was right in admitting the evidence in question under the general issue, notwithstanding the new rules, and the construction which has been given in argument to stat. 3 & 4 *W.* 4. *c.* 42. *s.* 1.; for it is clearly the provision of stat. 43 *Eliz. c.* 2. *s.* 19., to which the clause cited in the statute of *William* extends, that the whole of the matter of defence may be proved under the general issue. But, as to the harness, I think that the learned judge was not correct in leaving the case to the jury upon the suggestion of a possibility that the defendants might have taken off the harness and left it on the premises. The rule must therefore be absolute.

LITTLEDALE J. As to the first point, the statute of *Elizabeth* says that a defendant shall be at liberty to plead not guilty, and, upon the trial of the issue on such plea, the whole matter is to be given in evidence on both sides, according to the very truth. I think therefore that, under this statute, the defendants might prove the whole defence on the plea of the general issue, notwithstanding the general rules of *Hil.* 4 *W.* 4. As to the other point, I think the direction was wrong.

PATTESON J. I am of the same opinion on the last point. The harness was on when the horse was seized; there was no evidence of its having been taken off and left; and, the defendant being once proved to have seized the harness, it lay upon him to shew that he had disposed of it in the manner suggested. As to the other point, I am of opinion that the matter in question was admissible under the general issue;

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and I do not rely only on the statute of *Elizabeth*, though the expressions there used, "the whole matter to be given on both parties in evidence, according to the very truth of the same," are much stronger than the words "giving the special matter in evidence:" but I think that wherever a statute says that a party may prove his defence under the general issue, it means that he may prove the whole matter of defence(*a*). Here it was not sufficient defence that the parties were overseers; they had to prove that they distrained for a rate, and that they seised the goods of a person liable. If the fact that the goods were those of the party liable be excluded from proof under the general issue, then, to establish the present defence, the defendants must have put two pleas on the record: and there is no instance in the history of pleading, in which a party has been obliged to plead two pleas for a single defence. I think therefore that, wherever a statute authorises proving a defence under the general issue, it is meant that the whole defence may be so proved; and consequently that the statute 3 & 4 *W.* 4. *c.* 42. *s.* 1., when it says that the contemplated rules shall not deprive any person of the power of pleading the general issue and giving the special matter in evidence, where he is now entitled by statute to do so, means by the "special matter" the whole matter of defence.

COLERIDGE J. On the point as to the general issue, I entertained some doubts, which I think it right to say are removed; but I would rather ground my decision on the words of the statute of *Elizabeth* than on those of the later act. The difficulty suggested, that two pleas might become necessary for a single defence, does

(*a*) See the language used to this effect in stat. 7 *Ja.* 1. *c.* 5.

not

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not seem to arise; for, before the new rules, the answer, under the general issue, that the goods were not the property of the plaintiff, would have been an entire defence without any thing further. I therefore consider it best to rely on the words of the statute of *Elizabeth*; but I think the intention of the late statute was to affirm, and not to repeal, acts which give a defence under the general issue. On the other point, the smallness of the sum would have been an answer to the present application, if the learned judge had not misdirected the jury; but it is a misdirection where the judge in his summing up speculates upon a fact not in evidence nor deducible from the circumstances of the case. The rule must therefore be absolute.

Rule absolute.

ELIZABETH URMSTON *against* THOMAS NEWCOMEN.

Monday, May 2d.

ASSUMPSIT for work and labour in instructing *Elizabeth Newcomen*, the infant daughter of the defendant, in reading, &c., and other necessary and useful accomplishments, &c., at the special instance and

Quære, whether a father deserting his infant child be liable in assumpsit to a party who supplies the child with necessaries, no further proof of contract being given?

No such action can be maintained, if the father had reasonable ground to suppose that the child was provided for.

U. offered to *N.* to take care of *N.*'s child, without putting *N.* to any expense; upon which *N.* gave up the child to *U.* Afterwards *U.* gave up the child to *N.*'s wife, who was living apart from *N.*, in adultery; and afterwards the child, to escape cruel treatment by *N.*'s wife and the adulterer, returned to *U.*, who maintained it thenceforward: Held, that *N.*, who had no notice of the child's quitting *U.* at all, or of the cruelty, was not liable to *U.* for the maintenance of the child, inasmuch as the facts did not shew any desertion of the child by *N.*, and negatived a contract between *N.* and *U.*

And that it made no difference that *U.*, when she made the original undertaking, was a married woman; the ground of the decision being, not that *U.* had made a valid contract, but that the circumstances negatived desertion; and that, therefore, the question as to the implied liability did not arise.

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1836.

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And that it made no difference that *U.*, when she made the original undertaking, was a married woman; the ground of the decision being, not that *U.* had made a valid contract, but that the circumstances negatived desertion; and that, therefore, the question as to the implied liability did not arise.

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URMSTON *against* NEWCOMEN.

request of the defendant, and for clothing and suitable apparel, &c., and other necessary things by the plaintiff found and provided, and used, &c., in and about that work and labour, and at his like special &c., and for meat, drink, &c., found, &c., at the like special &c., and for other work and labour, and for goods sold and delivered, for money lent, for money paid, for money had and received, and on an account stated. Plea, Non assumpsit (*a*).

On the trial, before Lord *Denman* C. J., at the *Middlesex* sittings after *Michaelmas* term, 1834, the following facts appeared: — On the 8th of *March* 1806, the defendant married *Elizabeth Urmston*, the daughter of Captain *Urmston* and Mrs. *Urmston*, the plaintiff. On the 10th of *June* 1810, Mrs. *Newcomen* left her husband's house and went to live with Major *Stratford*, with whom she continued living in adultery till some time between 1825 and 1829, when Major *Stratford* forsook her. She never returned to her husband. On the 10th of *February* 1811, while she was living with Major *Stratford*, she was delivered of a daughter, *Elizabeth Newcomen*. In *June* 1812, a female servant of Mrs. *Newcomen*, named *M'Namara*, took the child to the neighbourhood of the defendant's residence, and applied to him to acknowledge and provide for her. The defendant denied that the child was his; but he sent a servant for her, and placed her with his land-steward, where she was treated with great neglect. The plaintiff learning this, and hearing that the defendant purposed to send the child to the Foundling Hospital in *Dublin*, applied to him for her. He refused to give her up without a

(*a*) There were other issues, not material to the point here decided, which were found for the plaintiff.

written

written undertaking that the plaintiff would provide for her. The plaintiff then wrote and signed the following paper, addressed to *Nicholas Ellis*, an attorney in *Dublin*: —

"I shall never ask him for a sixpence for it.

"Order for Mrs. *Newcomen*'s child.

"Whoever has Mrs. *Newcomen*'s child, please to deliver her to Mr. *Ellis*, or Mrs. *M'Namara*, or to Mr. *Ellis*'s order, with all her things sent with her; and Mr. *Newcomen* will never be asked for a shilling, either for her maintenance, clothes, education, or journey.

"*September* 27, 1812. "*Eliza Urmston.*"

This letter was forwarded through Mr. *Ellis* to the defendant, and the child was given up by the land-steward, and sent to the plaintiff. In 1813 or 1814, the defendant quitted *Ireland* and went to the Continent. He came to *England* in 1826, where he remained for a short time, then returned to the Continent, and in 1827 returned to *Ireland*; since which time he had been almost constantly, up to the commencement of the action, in *Ireland* or *England*. Miss *Newcomen* remained under the plaintiff's care for about two years; when Mrs. *Newcomen* took her away, and took charge of her. The plaintiff's husband, Captain *Urmston*, died in *November* or *December* 1815. In 1816, Mrs. *Newcomen* sent the child back to the defendant, but took her again in about three years. After Miss *Newcomen* was so taken back, she was treated with great cruelty by Major *Stratford* and Mrs. *Newcomen*, and, in 1825, having been violently beaten by Mrs. *Newcomen*, she escaped from the house, and fled to the defendant, who maintained her from that time. She became extremely ill, which she attributed to the treatment received from her mother;

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mother; and, for some years before the commencement of the action, was confined to her bed by a spinal complaint, and unable to stand. Mrs. *Newcomen* died on the 6th of *January* 1832; when a letter was sent by the plaintiff to the defendant, announcing the death of Mrs. *Newcomen*, and adding "I trust I shall receive a remittance to put her decently under ground, being the last thing that can be done, and the last claim on you. Surely you cannot dispute the payment of her funeral, which shall be as moderate as possible."

The defendant had never contributed to the expenses of the maintenance of Miss *Newcomen* since she was received from him in 1812. This action was brought for the expenses to which the plaintiff had been put for her. The writ was sued out on *October* 11th, 1832. For the plaintiff it was contended that a father who deserted his child was liable to repay the party who maintained it. The Lord Chief Justice directed the jury to find for the plaintiff, unless they thought she had waived her claim by the letter of *January* 6th, 1832. The jury found for the plaintiff, giving at the rate of 80*l.* per annum, up to the commencement of the action.

In *Hilary* term 1835, Sir *W. W. Follett*, Solicitor-General, obtained a rule for a new trial for misdirection, or for a nonsuit, or for a reduction of damages on the ground that the jury should have given no damages for the time subsequent to Miss *Newcomen* attaining the age of twenty-one.

Sir *John Campbell*, Attorney-General, now shewed cause. The child must be assumed, at this stage of the case at least, to be the legitimate child of the defendant. The age is not important: a female acquires some

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some rights at the age of fourteen; but it will not be denied that the liability of the defendant, if it exist at all, exists as to all the time before the child attained the age of twenty-one. Then the question is, whether a father, if he desert his legitimate child, be not liable in assumpsit to any one who provides food and clothing for it. There is no express decision on the point. The obligation must be as strong in the case of a child as in that of a wife. The foundation, in one case, is the duty on the part of the husband to provide for his wife; that foundation exists in the other case, because the primary duty is equally imperative. If a party be bound to perform an act, and neglect it, another party performing it for him acquires a right of action against him. Thus, if a dead body be neglected, an undertaker who buries it may sue the executor. [*Coleridge* J. Is that more than a charge on the assets? Would not want of assets be a defence?] A party who relieves a neglected pauper, may sue the overseer. [*Coleridge* J. In *Blackburn* v. *Mackey* (*a*), *Abbott* C. J. held that a father was not liable for clothes furnished to his son, being under age, unless an express or implied authority were shewn.] The desertion here is ground for implying a contract. In *Maule* v. *Maule* (*b*) a son raised an action of aliment against his father before the Court of Session in *Scotland*; and that Court held the father liable to an annual aliment, which they fixed according to their view of the rank and means of the parties. The House of Lords reversed that judgment, and assoilzied the father; but it was not disputed, in the judgment (*c*), that a father is bound, at all events, to protect his

(*a*) 1 *C. & P.* 1.

(*b*) 1 *Wils. & Shaw*, 266.

(*c*) See pp. 291, 293.

child

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child from actual destitution. Then, as to the particular facts here. The undertaking of *September* 27th, 1812, is of no effect, as Mrs. *Urmston* was then a feme covert, and her husband's assent is not shewn. Further, that contract, supposing it valid, was put an end to by the mother taking the child under her charge; for the mother was the wife of the defendant, not having been divorced, and the law will recognise her as her husband's agent so far as relates to the care of the child. The child was afterwards driven from the mother by ill-treatment. The grandmother, in then receiving her, was not acting upon the undertaking of *September* 27th 1812, but stood in the situation of a party relieving a deserted child. The defendant was abroad, and could, therefore, receive no notice. He was situated as the owner of a ship which is supplied with necessaries in a foreign country, without express authority from him: such an owner would be liable to an action if it was impossible to apply to him in time, though not otherwise.

Alexander contrà. The supposed foundation of the defendant's liability does not exist. It is not true that by the common law a father is bound to maintain his child. There are indeed statutory means of compelling parents to provide for their children; but the statutes authorise only particular modes of enforcing the natural duty; and, where such modes are not resorted to, no contract can be implied like that now contended for. There is no express decision on the point; and, with the exception of foreign treatises, the text books are nearly silent upon the subject. In 1 *Blackst. Com.* 449. it is said, "No person is bound to provide a maintenance for his issue, unless where the children

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are impotent and unable to work, either through infancy, disease, or accident; and then is only obliged to find them with necessaries, the penalty on refusal being no more than 20s. a month." There the liability is placed exclusively on stat. 43 *Eliz. c.* 2. *s.* 7.; and, indeed, the existence of the statute seems of itself to shew the absence of a common law liability. [*Coleridge* J. In *Cooper* v. *Martin* (*a*) *Le Blanc* J. says, "The only method of compelling maintenance is by the order prescribed by the statute of *Elizabeth*;" and he adds that that extends only to natural relations.] Subseqent statutes have been passed on the subject, confirming this view of the case. Thus stat. 1. *Ann. c.* 30. sess. 1. enables the Lord Chancellor to compel Jewish parents to maintain their children, being protestants, suitably; this statute was occasioned by the decision in *The Inhabitants of St. Andrew's* v. *De Breta* (*b*), from which the absence of a common law liability must be inferred. [Sir *John Campbell.* By the common law, if a child perish for want of proper care, it is murder in the person neglecting it. Lord *Denman* C. J. If the person has the actual custody. *Patteson* J. Or the child be part of his family. Would it be murder in a parent to abscond?] From *Blackburn* v. *Mackey* (*c*) and *Fluck* v. *Tollemache* (*d*) it appears that there must be an express or implied contract proved, in order to render the father liable to a party furnishing an infant with clothes: if there were such a general liability as is contended for, no such proof could ever be necessary. The proper remedy is to summon the father before a magistrate. As to the suggested case of

(*a*) 4 *East*, 84.
(*b*) 1 *Ld. Raym.* 699.
(*c*) 1 *C. & P.* 1.
(*d*) 1 *C. & P.* 5.

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an undertaker burying a neglected dead body, the executor is liable to repay only when there are assets; and this rests upon the duty of applying the testator's property fitly: it is like discharging a debt on the contract of the testator himself. Besides, both in that instance, and in the other supposed case of an overseer, the law has unquestionably created the obligation, whilst the very point disputed at present is the existence of any obligation at all. It is argued that the wife was the husband's agent. But that proceeds upon a mistake of the facts. Mrs. *Newcomen* was living with Major *Stratford;* and the presumption of authority, if there be any, is negatived where the wife is living in adultery and apart from the husband. Even under stat. 5 *G.* 4. *c.* 83. *s.* 9. the husband is not punishable for not supporting her; *Rex* v. *Flintan* (*a*). There *Bayley* J. said, "The ground of a husband's liability in an action for goods supplied to his wife is a supposed authority communicated to her by him; but when she improperly leaves him, that authority is determined, *Manby* v. *Scott* (*b*)." *Govier* v. *Hancock* (*c*) also supports the doctrine laid down by *Bayley* J. How then can the wife, living apart in adultery, have authority to bind the husband in what respects the child? At the trial, Lord *Eldon*'s dictum in *Rawlins* v. *Vandyke* (*d*) was cited, that, where the father does not assert his right to the custody of the children, but suffers them to remain with their mother, "he thereby constitutes her as his agent, and authorises her to

(*a*) 1 *B.* & *Ad.* 227.

(*b*) 1 *Sid.* 109. 1 *Keb.* 69, 80, 87, 206, 337, 361, 383, 429, 441, 482. 1 *Lev.* 4. 1 *Mod.* 124. 1 *Bac. Abr.* 714. *Baron and Feme* (H.) 7th ed.

(*c*) 6 *T. R.* 603.

(*d*) 3 *Esp.* 252.

contract

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contract those debts for clothing and other necessaries." That cannot be applied to a case where the mother has lost even the right of rendering her husband liable for necessaries supplied to herself. It is true that in *Hesketh* v. *Gowing* (*a*) Lord *Ellenborough* held that the father of a bastard, adopting it as his own, was liable for necessaries supplied to it. But that is on the ground of acquiescence by him, which is here negatived. Supposing, however, that the common law liability existed as contended for, the facts here shew that that liability is extinguished. The defendant gave up the child to the plaintiff on her express undertaking to provide for it at her own expense. How, after that, can the plaintiff insist upon the defendant's liability? It has been argued that the defendant's husband was no party to the undertaking, and, consequently, that it was inoperative as being made by one not sui juris. But the undertaking was made in 1812, and Captain *Urmston* did not die till 1815: he must, therefore, have known of the contract, and, by acquiescing, have adopted it. Besides, the question here is, not whether Mrs. *Urmston* bound herself by any contract, but whether the defendant has rendered himself liable by any thing which he has done. It is clear that the plaintiff, when she received the child back from her mother, received her upon the former footing; and the letter of *January* 6th, 1832, evidently treats the defendant as liable to no claim but that in respect of the funeral expenses. This letter was put in, not, as suggested in the charge to the jury, to shew a waiver of the contract, but to shew that such contract had never

(*a*) 5 *Esp.* 131.

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existed. The shifting about of the child, and the cruelty she experienced from the mother, do not create any charge on the defendant, who was privy to neither, but who might have had notice if the plaintiff had thought proper. His absence from the country (if at all important) raised only a temporary obstacle, for, in 1826, he was in *England* for a short period, and, in 1827, returned permanently to *Ireland*. At any time, therefore, after 1826, the plaintiff might in fact have revoked her express undertaking to provide for the child, and thus reimposed upon the father his assumed common law liability, supposing it could be reimposed at all. Neither that notice nor that revocation having taken place, it is impossible to charge upon the defendant that he deserted his child with a knowledge of its destitute condition.

Lord DENMAN C. J. The general question is important; but the facts do not raise it. In order that the law should imply a liability in the father to repay another for supporting his child, it is absolutely necessary that desertion of the child by the father should be proved. Now that is not shewn here. The strongest way in which the case can be put for the plaintiff is, that utter neglect and want of inquiry, on the part of the father, might be like a deliberate desertion. But the evidence does not go even that length. For, though the plaintiff's letter might not always be present to her mind, and though she might even have discontinued her intention of providing for the child, the father might say, "by the desire of the child's grandmother, and on her express undertaking that I should not be put to any expense, I left the child with her."

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While he had reason to suppose that the grandmother was maintaining the child at her own expense, he could not be said to neglect the child. Such an expectation may perhaps now appear to have been unreasonable, and contrary to the fact; but that does not shew that his conduct at the time amounted to total neglect. It would be unjust to a father, who was poor, and had thought that another would save him from the expense of providing for his child, to hold that he was guilty of desertion by acting upon such a belief. We have no right to suppose that, if he had had notice from the grandmother that she would no longer maintain the child, he would not have taken care of it. The general question, therefore, which we should approach with much anxiety, does not arise; but, upon the other and more limited view of the case, I think this rule should be made absolute for a new trial.

LITTLEDALE J. The general question does not arise. The mother leaves the father, and lives in adultery; then a child is born, as to which the father, apparently, doubts whether it be his; and he is going to put it into the Foundling Hospital; the grandmother, not liking this, sends for the child, and says (with or without the knowledge of her own husband) that the defendant shall be put to no expense. The child is then put into her custody. Afterwards the mother takes it; after which it is sent back again to the grandmother, and then to the mother again: and then it returns to the grandmother; being sent backwards and forwards according to the caprice of the mother. As far as related to the defendant, the child was still in the custody of the grandmother; for he is not proved to

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have known that she was not in that custody, or that the circumstances of cruelty had occurred. His original wish had been to put her in the Foundling Hospital at *Dublin;* and he might well presume that she was in custody better than that of the Foundling Hospital. I do not say that he might not have found out how the fact actually was; perhaps he might not be anxious to learn: but the grandmother never applied to him. As to the argument that the plaintiff was a married woman, and not capable of entering into the undertaking, that is immaterial; for the question is not, whether the undertaking created a legal charge on the plaintiff.

PATTESON J. I agree that the general question does not arise. The circumstances are peculiar. The plaintiff cannot say that the defendant made a contract, either express or implied, *with her.* The defendant doubted whether the child was his; however, he had the control over it, and placed it with his steward. He was about to provide for it (whether he was right or wrong as to the provision which he meant to make is immaterial); and then, at the request of the plaintiff herself, he gave it up to her. The plaintiff was then a married woman; but it is immaterial whether the letter of *September* 27th constituted a binding contract on the plaintiff: it is enough, if it induced the defendant to part with the child, so as to negative the presumption of a contract by him. Afterwards, it is true, the child is taken from the grandmother: but that was in no sense the act of the defendant; the child was taken by the mother, then living apart from the plaintiff in a state of adultery, and we know of no communication between the plaintiff and his wife. The defendant, therefore, did not of his

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his own act take the child out of the plaintiff's custody. No communication is made to him till 1832. But it is said that he was abroad. If he was (which, however, is negatived even as to a part of 1826), it makes no difference. A letter would go abroad: this is not a question as to suing a party who is abroad, but of giving him notice. A letter might have been written to the continent as well as to a place in this country. The plaintiff took no steps to shew to the defendant that he must come forward; *she*, therefore, has no right to sue him. This leaves untouched the question, how far a party, who finds a child in a state of destitution, and provides for it, can sue its father.

COLERIDGE J. It is best to say nothing on the general question. For the purpose of this case, I will assume (what is not to be understood as my opinion at present) that the general liability is as contended by the Attorney-General. Then how does the Plaintiff charge the defendant? The child is treated by the plaintiff as legitimate, and placed under the charge of his steward. The grandmother finds that the child is ill treated; but it does not seem that the defendant knew this. He parts with the custody on an express understanding that he is to be put to no further expense. It is said that the plaintiff was a married woman. But suppose her husband, while alive, had brought the action, the defence would have been, not an allegation that the plaintiff had contracted, but a repudiation of any contract by the defendant. It is material too that, although the expense sued for was incurred during a series of years, no knowledge at all is brought home to the defendant of the child's being, at any period, otherwise than

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under the care of an indulgent grandmother; he, therefore, stands on the same footing as when he first parted with the child.

Rule absolute for a new trial.

Tuesday. May 3d,

MARY SUSANNAH PIGGOTT *against* RUSH.

Assumpsit for unliquidated damages, is within the saving clause in sect. 7. of the statute of limitations, 21 *Jac.* 1. c. 16.

If a party, who is in prison when the cause of action accrues, commences an action after the six years have elapsed, but during the continuance of the imprisonment, the operation of the statute is barred by the saving clause in sect. 7.

ASSUMPSIT, on defendant's promise to conduct with care certain proceedings in Chancery as the plaintiff's solicitor; breach, negligence. Plea, that the supposed causes of action did not, nor did any of them, accrue within six years before the commencement of this suit. Verification. Replication, that, at the time when the cause of action first accrued, the plaintiff was imprisoned, and that she continued so imprisoned until and upon, to wit, the 11th of *June* 1834, which was the first time of her being at large after the accruing of the cause of action; and that she commenced this suit within six years next after the time of her first so being at large. Verification. Rejoinder, that the plaintiff commenced this suit whilst she was so imprisoned, and before the first time of her being at large therefrom; and that the supposed causes of action did not, nor did any of them, accrue at any time within six years next before the commencement of this suit. Conclusion to the country. Demurrer, for that the matters stated in the rejoinder tender an immaterial issue.

Mansel, for the plaintiff. Assumpsit is within the proviso in sect. 7. of the statute of limitations, 21 *Jac.* 1. *c.* 16.; *Chandler* v. *Vilett.* (*a*) The rejoinder

(*a*) 2 *Saund.* 120.

suggests

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suggests no answer: if a party could not sue while the protection of the proviso continued, an infant could never sue except within six years of the cause accruing: and the effect would be to disable from the expiration of the six years to the time of majority, and then to give a revived right for six years. The objection which the rejoinder raises was also made in *Chandler* v. *Vilett* (*a*), and failed.

G. Hayes, contrà. The proviso merely says that the party may sue within six years after coming of age; it does not say that the statute shall not run against him in the mean time under any circumstances. *Chandler* v. *Vilett* (*a*) is the only authority. The other point, which arises on the replication, is that assumpsit for unliquidated damages is not within the proviso. The words of the proviso are "any such action of trespass, detinue, action sur trover, replevin, actions of accounts, actions of debts, actions of trespass for assault, menace, battery, wounding or imprisonment, actions upon the case for words:" none of these words apply to assumpsit. It is true that, in *Chandler* v. *Vilett* (*b*), it was held that the proviso applied to indebitatus assumpsit. That case was decided at a time when the Courts leaned strongly in favour of restricting the operation of the statute; but latterly it has been construed more liberally, as one passed "for quieting of men's estates, and avoiding of suits." Many of the early decisions have been overruled on this ground. [*Patteson* J. In *Crosier* v. *Tomlinson* (*c*) the Court held that the words "action of trespass," in the proviso, comprehended assumpsit.] That action, like *Chandler* v. *Vilett* (*b*), was indebitatus

(*a*) 2 *Saund.* 121 *a*. (*b*) 2 *Saund.* 120. (*c*) 2 *Mod.* 71.

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assumpsit; and three of the judges said it would be very strange if the plaintiff could bring debt and not indebitatus assumpsit. Supposing that the Court will now adopt so violent a construction, still the analogy between debt and indebitatus assumpsit does not extend to assumpsit for unliquidated damages. *Swayn* v. *Stephens* (*a*) (which was relied on in *Crosier* v. *Tomlinson* (*b*)) is not applicable here. The question there was, whether trover was within the enacting section, the third, where it is expressly mentioned in the introduction, and is clearly comprehended under "the said actions upon the case," which follows in the limitation clause. But there are no words in the proviso including assumpsit for unliquidated damages; and this circumstance is the stronger, because two species of actions of the case, trover and for words, are expressly mentioned in the proviso, and actions on the case are mentioned generally in the enacting section. There is a class of cases in which an interpretation has been put on the words in the enacting section, "actions of debt grounded upon any lending or contract without specialty;" and it has been held that a debt created by statute, or by an award under seal, is not within these words (*c*). Modern decisions, however, are generally in favour of a liberal interpretation of the statute, and, consequently, of a strict interpretation of the proviso.

Mansel, in reply. The words in the proviso, sect. 7., are, "that if any person or persons that is or shall be intituled to any such action of trespass," &c.; the reference is to the enacting clause in the third section, and

(*a*) *Cro. Car.* 245. (*b*) 2 *Mod.* 71.

(*c*) See *Hodsden* v. *Harridge*, 2 *Wms. Saund.* 64 *b.*, and the notes there.

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the proviso, though it specifies only a few causes of action, by way of instance, must be understood as applicable to all comprehended in the enacting clause. But, besides, assumpsit is an action of trespass, according to the old use of the word; thus, in the old form of declaring by bill, the defendant was said to be in the custody of the marshal, "of a plea of trespass on the case on promises." "Upon the case" in the third section would have included assumpsit on accounts between merchant and merchant, but for the express saving.

Lord DENMAN C. J. It seems to be hardly disputed that the plaintiff may recover, if assumpsit for unliquidated damages be within the proviso in the seventh section. Indebitatus assumpsit is held to be so in *Chandler* v. *Vilett* (*a*); and in *Crosier* v. *Tomlinson* (*b*) assumpsit is said to be included in trespass. That is certainly rather strong. Yet, if assumpsit were omitted from the proviso, the omission was so palpably unintended that the Courts perhaps were justified in straining the language. We cannot now overrule those cases.

LITTLEDALE J. We are bound by the cases. If it were res integra, I should be of a different opinion. I may remark that different words are used in different parts of the statute without any reason whatever. I cannot say that I think the cases cited were rightly decided.

PATTESON J. We cannot decide in favour of the defendant without overruling those cases. A distinction has been suggested between indebitatus assumpsit,

(*a*) 2 *Saund.* 120. (*b*) 2 *Mod.* 71.

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and assumpsit for unliquidated damages: but the question turns on the words of the act; and, if assumpsit be comprehended under the words at all, it is so equally, whether it be for liquidated or unliquidated damages.

COLERIDGE J. We cannot overrule cases which have been followed by such invariable practice.

Judgment for the plaintiff.

Tuesday, May 3d.

COLEBROOKE *against* TICKELL and WALKER.

The lord of a manor, as owner of a market in the parish of *W.*, was entitled to part of certain market tolls in *W.* By an act for better paving part of *W.*, authority was given to levy rates for the purposes of the act; and by the same act the market tolls were made payable to commissioners, who were to collect them and to pay over to the lord a part equivalent to his former dues. There was no clause in the statute making the lord rateable in respect of these payments.

By a subsequent local public act, for the relief of the poor in *W.*, for cleansing, lighting, and watching, and for repair of highways, in *W.*, and for repairing the parish church, it was enacted (sect. 53.) that certain rates should be laid "upon all and every the person and persons who do and shall inhabit, *hold, occupy, possess, or enjoy* any land, house, shop, warehouse, or other building, *tenement, or hereditament;* that is to say," one rate for the relief of the poor, one for repair of the church, and a third for cleansing and lighting streets, and watching and repairing highways within such parts of the said parish as are not within certain liberties; such last-mentioned rate to be a pound rate (not exceeding a certain proportion) "*upon or according to the annual rent or value of all messuages, lands, tenements, and hereditaments as shall be held or occupied within such parts of the said parish as are not within the said liberties.*" By a subsequent section, the rates for the poor were to be levied and recovered in the same manner as poor rates are directed to be levied and recovered by stat. 43 *Eliz. c.* 2.

In several subsequent clauses of this act, and in the rating clause and a previous one of the paving act, the words "tenement" and "hereditament" were used with reference to corporeal hereditaments solely.

Held, that, in sect. 53. of the more recent act, "hereditaments," in the clause fixing the pound rate, meant such as were local and corporeal only; and that "hereditament" in the prior clause of the same section must be construed in the same sense: and therefore that the payments to the lord in lieu of toll were not rateable under this act.

TRESPASS for distraining plaintiff's goods. Plea (under stat. 21 *Ja.* 1. *c.* 12. *s.* 3., and the local acts after mentioned), Not Guilty. The following case was stated for the opinion of the Court, pursuant to stat. 3 & 4 *W.* 4. *c.* 42. *s.* 25.

Stat. 11 *G.* 3. *c.* 15, for the better paving that part

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of the *High Street*, in the parish of *Whitechapel*, which lies in *Middlesex*, &c., appoints commissioners for the purposes therein mentioned; and it recites (sect. 38.), that "there is due, and has been accustomed to be received, for every cart or waggon loaded with hay brought into the said parish, and sold on the usual market days, the sum of 6*d.*, 2*d.* whereof is due and of right belonging to the lord of the manor of *Stebonheath*, otherwise *Stepney*, in the county of *Middlesex*, as owner or proprietor of the said market, and has accordingly, from time to time been paid to and received by him;" and that 2*d.*, other part of the said 6*d.*, is due to the parish for taking away the dirt occasioned by such carts, &c. and has been paid to the householders and inhabitants before whose doors such carts, &c. have stood on the market days, for the use of the parish; and that the remaining 2*d.* is due to and has been received by the last-mentioned householders and inhabitants. It is then enacted, for the better carrying into execution the purposes of the act, that from and after &c., there shall be paid to the receiver or receivers, collector or collectors, to be appointed by the said commissioners, "for every cart or waggon loaded with hay, which shall be brought into the said parish for sale on the usual market days, and sold or exposed to sale, the aforesaid sum of 6*d.* in lieu of all other tolls which are or shall be authorised to be taken and collected, the said receiver or receivers, collector or collectors, paying thereout to the lord of the said manor, or such other person as shall be owner or proprietor of the said market for the time being, or such person or persons as shall be appointed by him or them to receive the same, the sum of 2*d.* clear of all charges and expenses, for

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for every cart or waggon loaded with hay, which shall be brought into the said parish, and sold or exposed to sale on the usual market days as aforesaid."

Section 34. enacts, for defraying the charges attending the execution of the powers of this act, that a rate or assessment, over and above those now payable, shall, once or oftener in every year, be made and assessed by the commissioners upon all persons "who do or shall *inhabit, hold, occupy, possess, or enjoy any house, shop, warehouse, cellar, vault, or other tenement within the said street,*" for raising such a sum as the commissioners shall think needful, so as such rate or rates do not in any year exceed, in the whole, 1*s.* 6*d.* in the pound "of the yearly rents or yearly values of such *houses, shops, warehouses, cellars, vaults, or other tenements or hereditaments* respectively; and that all and every *tenant of every house, shop, warehouse, cellar, vault, or other tenement or hereditament,* shall and may deduct one third of such sum as shall be so assessed," out of his rent, and "the landlord and landlords, owner or owners of *such premises*" are required to allow such deduction, on the residue being paid.

Stat. 46 *G.* 3. *c.* lxxxix. (local and personal, public), "for the better relief," &c. "of the poor within the parish of *St. Mary, Whitechapel,* in the county of *Middlesex;* for cleansing and lighting the squares," &c. and keeping a nightly watch, and for raising money for repairing certain of the highways, and the parish church, enacts, by sect. 53, "That from and after the passing of this act, the rector, churchwardens, overseers of the poor, and vestrymen of the said parish" of *Whitechapel,* "qualified as aforesaid, shall assemble and meet together in the vestry-room of the said parish, within" fourteen

fourteen days after the sums to be levied shall have been ascertained, as is directed to be done annually by sect. 52, "and the said rector," &c. "or any nine or more of them, so assembled, shall, and they are hereby required to make and sign three distinct rates or assessments, not exceeding the amount of the respective sums so settled and ascertained, upon all and every the person and persons who do and shall *inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, or other building, tenement, or hereditament;* (that is to say), one rate or assessment for the relief, maintenance, regulation, and employment of the poor of the said parish; and also for paying" (composition money to the trustees under a certain highway act); "one other rate or assessment for defraying the expenses of the repairs of the said parish church," and for payment of certain annuitants charged thereon; "and one other rate or assessment for cleansing and lighting the squares, streets," &c., "and regulating a nightly watch, and repairing the highways within such parts of the said parish as are not within the said liberties of his Majesty's Tower of *London*, and city of *London;* such last mentioned rate to be a pound rate upon or according to the annual *rent or value of all messuages, lands, tenements, and hereditaments, as shall be held or occupied within such parts of the said parish* as are not within the said liberties, provided that the same does not exceed in any one year the sum of 1*s.* 8*d.* in the pound upon such messuages, lands, tenements, and hereditaments."

Sect. 60. enacts that the rates to be made and assessed as aforesaid, for the relief of the poor, "shall be received, collected, levied, and recovered in such and the

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the same manner as rates and assessments made for the relief of the poor are directed to be levied and recovered by the said act passed," &c. (43 *Eliz. c.* 2.), "or by any subsequent act or acts relating to the relief of the poor; and such said several methods of levying and recovering the said rates or assessments for the relief, maintenance, and employment of the poor, shall and they are hereby declared to be the legal methods of enforcing the rates or assessments directed to be made in pursuance of the said act for the relief, maintenance, and employment of the poor of the said parish, as fully and effectually as if such ways and methods were repeated and re-enacted in the body of this act."

Other clauses of the two local acts were stated in the case, which it is unnecessary to notice further than as they are adverted to in the argument.

The plaintiff is lord of the manor of *Stepney*, and owner of the market above mentioned; and, during the time for which the after-mentioned rates were made, he received the sums of 2*d.* payable to the owner of the market under stat. 11 *G.* 3. *c.* 15. *s.* 38. There was no ground for rating the plaintiff, unless he was rateable "in respect of the market, or the said money payment in lieu of toll."

The case stated that the rector, &c., assembled according to stat. 46 *G.* 3. *c.* lxxxix. above mentioned, duly made and signed three distinct rates or assessments (not exceeding the sums settled and ascertained according to the statute), "upon all and every the person or persons who did inhabit, hold, occupy, possess, or enjoy, any land, house, shop, warehouse, or other building, tenement, or hereditament, and among others upon the said plaintiff," as lord of the manor and owner of the market, in respect of

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of the said sum of 2*d.* for every cart or waggon, &c. One of the rates to which he was assessed was for the relief of the poor and other purposes; the other rate, for cleansing and lighting the squares, streets, &c., and repairing the highways. The rates were duly allowed and published. The plaintiff not having paid the sums assessed upon him by these rates, his goods (after summons, &c.) were distrained upon by virtue of two warrants under the hands and seals of the defendants, justices of *Middlesex*.

The question for this Court was, whether the plaintiff was liable to either of the two rates on account of the sums of 2*d.* payable to him as above stated.

Sir *W. W. Follett*, for the plaintiff. The plaintiff, if rateable, can only be so by force of the local acts, inasmuch as he is not shewn to be an inhabitant of the parish, or to occupy any real property within it. Neither the market toll nor the payment in lieu of it under stat. 11 *G.* 3. *c.* 15. could make him an occupier within stat. 43 *Eliz. c.* 2. *s.* 1.; *Rex* v. *Bell* (*a*). (This point was conceded.) Then the plaintiff, if liable to rate, must be so under stat. 46 *G.* 3. *c.* lxxxix. *s.* 53. as holding, occupying, possessing, or enjoying an "hereditament" in the parish; but by stat. 11 *G.* 3. *c.* 15. the toll formerly payable to the lord is vested in the commissioners appointed by that act; they, if any person, would be the rateable occupiers: the plaintiff merely receives the 2*d.* from them as part of a sum which comes to their hands to be distributed. He has no power to demand, or to receive it, but through them. But further, the statute of 46 *G.* 3. was not intended to

(*a*) 5 *M.* & *S.* 221.

impose

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impose a new liability on any person; its object was merely to establish a mode of rating. "Tenement" and "hereditament," in section 53., are not to be taken in the widest legal sense, but as limited to matters ejusdem generis with "land, house, shop, warehouse, or other building," mentioned just before. These words would have been unnecessary if "tenement" and "hereditament" had been used in the largest sense. And the final clause of sect. 53. speaks of all "messuages, lands, *tenements*, and *hereditaments*," which shall be "held or occupied within such parts of the said parish," &c., evidently contemplating something local and corporeal. [*Patteson* J. That clause refers only to the third of the rates mentioned; but the prior clause must, to make sense of it, be read with a reference to this, for, without such reference, there is no local limit given within which the persons inhabiting or holding any land, house, &c., shall be liable to rate.] Sect. 34. of the former stat., 11 *G.* 3. *c.* 15., which relates to the raising of rates for the purposes of that act, evidently uses the words "tenement" and "hereditament" in the limited sense here contended for; and sect. 38. speaks of "cellars, vaults, and other places, belonging to any house, shop, warehouse, or *tenement*." Sect. 68. of stat. 46 *G.* 3. *c.* lxxxix. gives certain powers to the overseers, "in order to avoid the loss which frequently happens by tenants or occupiers of houses, *tenements*, or *hereditaments*, quitting and removing from the same before the quarter day on which the rates or assessments, charged by virtue of this act, on the said houses, *tenements*, or *hereditaments*" become due. And the two words are used in the same limited sense in sections 69, 70, and 71., which also regard the rates. *Rex* v. *The Manchester*

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Manchester and Salford Waterworks Company (*a*) and *Rex* v. *Mosley* (*b*) are instances in which the word "tenements" has been held to take a qualified sense from the words with which it was associated. In this case very plain words should be pointed out, to burden the owner of the market with charges to which, unless by the local act, he is not liable.

Sir *John Campbell*, Attorney-General, contrà. The only question is, the meaning of "hereditament" in stat. 46 *G.* 3. *c.* lxxxix. *s.* 53.: it cannot be contended that these payments are within stat. 43 *Eliz. c.* 2. *s.* 1. The words in the present act are different from those of the statute referred to in *Rex* v. *The Manchester and Salford Waterworks Company* (*a*), and *Rex* v. *Mosley* (*b*): here the assessments are to be made on all persons who "inhabit, hold, occupy, possess, *or enjoy* any land, house, shop, warehouse, or other building, *tenement or hereditament*;" the words being apparently meant to be taken reddendo singula singulis. It is said that the clause ought not to be construed favourably to the imposing of a new burden; but there is, in principle, no reason against charging the property in question as well as property of other kinds, and the lord, who by stat. 11 *G.* 3. *c.* 15. *s.* 38., is in the situation of a cestui que trust with respect to it, is the person who in justice ought to be charged; not the commissioners, who derive no benefit from it. Not only the maintenance of the poor, but the cleansing and watching of the streets, and repair of the highways, are matters in which the owner of this market has an interest, and

(*a*) 1 *B.* & *C.* 630. (*b*) 2 *B.* & *C.* 226.

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to which he ought, in justice, to contribute. The construction, therefore, of the rating clause ought not to be limited without clear words having that effect. In *Rex* v. *The Trustees for paving Shrewsbury* (*a*), where the words "houses, shops," &c., were followed by the words "and other buildings and hereditaments," it was contended that "hereditaments" must be taken to mean hereditaments ejusdem generis with those enumerated before; but the Court held otherwise. [*Coleridge* J. The previous words there would have restrained the construction, but for the exception that followed.] It is true that, in both the present local acts, the word "hereditament" is sometimes used to denote such as are corporeal; but, where that is the case, the context shews clearly that it is meant to be so applied; and in local acts the same word is frequently used in different senses. The final clause of stat. 46 G. 3. c. lxxxix. s. 53., which speaks of "messuages, lands, tenements, and hereditaments," "held or occupied within such parts of the said parish," &c., refers, at all events, but to one of three rates; there is no ground for saying that it limits the prior clause of the same section, which speaks generally of hereditaments enjoyed. It may more reasonably be contended that the latter clause, by implication, extends to the general description of hereditaments mentioned in the previous one. [*Patteson* J. The first clause, taken alone, has no local limit; it may comprehend all persons throughout the kingdom.] It must be supposed that that limit is meant which would be the reasonable one. In *Rex* v. *The Manchester and Salford Waterworks Company* (*b*), *Bayley* J. relied upon the object contemplated by the act there in

(*a*) 3 *B.* & *Ad.* 216. (*b*) 1 *B.* & *C.* 633.

question,

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question, and argued that property, which the act was not intended to benefit, did not fall under its burdens. That argument cannot be used for the plaintiff here. In the subsequent case, *Rex* v. *Mosley* (*a*), where the same enactment was to be construed, the question was considered as res judicata.

Sir *W. W. Follett*, in reply. The distinction taken between the words now in question in 46 *G.* 3. *c.* lxxxix. *s.* 53., and the enacting words discussed in the two cases last cited, did not form part of the ground of decision in those cases. And the word "tenants" there would have included the persons holding or enjoying incorporeal hereditaments, if the enactment had, in other respects, been framed so as to include them. The decision in *Rex* v. *The Trustees for paving Shrewsbury* (*b*) turned upon the exception following the words "and hereditaments." So far as it bears on the present case, it is favourable to the plaintiff. From sect. 60 of stat. 46 *G.* 2. *c.* lxxxix. it appears that the legislature had stat. 43 *Eliz. c.* 2. in view; and it may be inferred that they did not mean to introduce liabilities not contemplated by that act.

Lord DENMAN C. J. I think the plaintiff is entitled to judgment. It is true that he does, in one sense of the words used in stat. 46 *G.* 3. *c.* lxxxix., "enjoy" a "hereditament"; but we must take the words, as was done in *Rex* v. *The Manchester and Salford Waterworks Company* (*c*) and *Rex* v. *Mosley* (*a*), with reference to the other words used in the same part of the act. The

(*a*) 2 *B.* & *C.* 226. (*b*) 3 *B.* & *Ad.* 216. (*c*) 1 *B.* & *C.* 630.

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words now in question "inhabit, hold, occupy, possess or enjoy any land, house, shop, warehouse, or other building, tenement, or hereditament," are large, and so they should be, to make a person rateable who was not so under the statute of *Elizabeth*. I cannot say what would be rateable, under the words here used after "land, house, shop, warehouse, or other building," unless it were the kind of hereditaments to which this case relates: but there are other clauses in the act which limit the sense; and I think the last clause of sect. 53, which fixes the rate there mentioned "upon or according to the annual rent or value of all messuages, lands, tenements, and hereditaments, as shall be held or occupied within such parts of the said parish as are not within the said liberties," shew that the former more general words apply only to what may be the subject of corporeal occupation. It is true that this language occurs with reference to one rate only; but it would be irrational to suppose that the words were used for the purpose of excepting the payments for market toll from that particular rate.

LITTLEDALE J. I am of opinion that the word "hereditament," in section 53 of stat. 46 *G.* 3. *c.* lxxxix, is to be confined to such things as are the subject of actual occupation. In stat. 11 *G.* 3. *c.* 15. *s.* 34., it is clearly so confined; (his Lordship then commented on this clause). And, in section 53. of the subsequent act, the last clause differs from the previous ones in which "hereditaments" are mentioned, if that word, in the previous clauses, is to have the extended sense which has been insisted upon. It may be said of tolls that they are "hereditaments" to be "held," according to the language used in the last clause

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clause of sect. 53, but the words "held or occupied within such parts of the said parish" imply something local, which the payments in question are not. The direction in sect. 60, referring to the statute of *Elizabeth*, is general, and, in the absence of any provision to a different effect, shews, I think, that the subject-matter of regulation is the same as under that statute. The present act does not seem to me to extend it. In sections 69, 70, and 71, "hereditaments" is applied to things which are the subject of occupation. The word being thus confined in so many clauses, I think that the legislature must be taken, in using it, to have contemplated those things only which are the subject of occupation. There does not appear to me to be any intimation of a design, in this act, to make persons liable to rates, who were not so under the former law.

PATTESON J. I think the plaintiff is clearly entitled to recover. He was not liable to be rated for the tolls down to 1770, nor does anything appear in the statute 11 *G.* 3. *c.* 15., passed in that year, which could render him liable in respect of the payments to be made to him under that statute. We are then called upon, under the subsequent act, to introduce such a liability by virtue of the word "hereditament." But the rate authorised by the clause in which that word occurs is a new rate, sanctioned by a local and personal act, which passed, as far as we know, behind the back of the owner of this market; and I cannot believe that, in an act so brought in, such an intention was entertained. If it was, it is strange that the words should not have been clearer: for words intended to lay a charge on the subject, which he was not liable to before, ought to be clear and intelligible.

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If "hereditament," in the clause in question, meant hereditaments generally, why was the previous enumeration made? I think that "hereditament" here means things ejusdem generis with those previously mentioned, according to the mode of construction adopted in *Rex* v. *The Manchester and Salford Waterworks Company* (a) and *Rex* v. *Mosley* (b). In *Rex* v. *The Trustees for paving Shrewsbury* (c) the word "hereditaments" was not taken in a sense extending beyond the descriptions of property with which it was associated; the property held rateable was ejusdem generis with "meadows and pastures." We are not, therefore, obliged to adopt a construction of the clause now in question which would be contrary to the ordinary meaning of the language used, and to justice and fairness.

COLERIDGE J. It seems conceded, on the one side, that "hereditament" may mean, and, on the other, that it does not necessarily mean, the kind of property now in question. The onus of shewing what is its proper sense in the present case lies upon those who seek to impose a new burden. In stat. 11 *G.* 3. *c.* 15., the thirty-fourth section, which imposes the paving rate, uses the word in a manner evidently shewing that something corporeal and local is intended. And it is clearly used in a like sense in the latter part of section 53 of stat. 46 *G.* 3. *c.* lxxxix. I think, therefore, that the defendants fail in making out that the legislature uses the word in the sense which they would ascribe to it.

Judgment for the plaintiff.

(a) 1 *B.* & *C.* 630. (b) 2 *B.* & *C.* 226. (c) 3 *B.* & *Ad.* 216.

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Wednesday, May 4th.

A pauper settled in *O.* met with an accident while resident in *M.*, which made him chargeable, and was relieved by *M.* The pauper being incapable of removal in consequence of the accident, an order of removal to *O.* was made, and immediately suspended: Held that, under stat. 35 *G.* 3. *c.* 101. *s.* 2., *O.* was liable to the expenses incurred by *M.* after the order.

ON appeal against an order of two justices removing *Samuel Vox* from the parish of *Monythusloyne* in the county of *Monmouth* to the hamlet of *Oldland* in the parish of *Bilton*, *Gloucestershire*, the sessions confirmed the order, subject to the opinion of this Court on the following case: —

Some considerable time before the happening of the accident after-mentioned, the pauper, being then settled in the hamlet of *Oldland*, resided in the parish of *Monythusloyne* for the purposes of his employment aftermentioned; and he continued so to reside there till the time of the making of the order appealed against. During his residence in *M.* he was employed in a colliery there; and, in the course of such his employment, he, on the 29th of *May* 1832, met with an accident by which his thigh bone was broken. He was thereupon carried to the nearest and most convenient dwelling house in *M.*; a surgeon was sent for by the parish officers of that parish: and the expense of 10*l.* 2*s.* 6*d.* was afterwards, and by reason of the accident, incurred by them in his cure and maintenance. The pauper had not before been chargeable to *M.* On 30th of *May* 1832, the pauper then being, by reason of the accident, incapable of being removed, or of being brought before a justice for that purpose without endangering his life, his examination was duly taken; and thereupon the order in question was made by two justices of the county of *Monmouth*; and an

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order of suspension was immediately indorsed thereon by the said justices. On 31st of *October* following, the pauper being fit to be removed, the same justices took off the suspension, and made an order on the appellants to pay 10*l.* 2*s.* 6*d.* for the expenses incurred under the suspension of the first order as aforesaid.

The question for the opinion of the Court was, whether, at the time of the order of removal, the pauper was removable from *Monythusloyne* so as to charge the appellants with the costs incurred under the suspension.

Greaves (with whom was *Talbot*), in support of the order of sessions, after referring to stat 35 *G.* 3. *c.* 101. *ss.* 1 and 2. and stat. 13 & 14 *C.* 2. *c.* 12. *s.* 1., was stopped by the Court.

Sir *John Campbell*, Attorney-General, and *Nicholl*, contrà. This party was a casual pauper. [*Patteson* J. Can an inhabitant of a parish be a casual pauper there?] In 2 *Nolan's Poor Laws*, 437. (ed. 4th), the definition is quite general. "Where a poor person, not settled in a parish, becomes chargeable, from accident, sudden calamity, or any other circumstance, he falls within the description of casual poor, and the parish in which he is detained becomes bound to relieve and take care of him." In 4 *Chitty's Burn's Justice*, p. 234, *Poor*, ch. iii. s. 1. it is said (*a*), "Whoever is by *sudden emergency or urgent*

(*a*) 26th ed. In the 28th edition of the same work (ch. I. ii. 15. 1. vol. iv. p. 89.) the following distinction is drawn: — "It is true, that where an *inhabitant* of the parish is so afflicted, an order for his removal may be obtained, and execution of it suspended, and then the expenses incurred

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urgent distress deprived of the ordinary means of subsistence, has a right to resort for immediate relief to the overseers of the poor of the parish in which he may happen to be at the time when he is thus bereft of support, whether he has acquired a settlement there or not; and it is the bounden duty of the overseers *immediately* and without waiting for an order of relief, to render the necessary assistance in such cases. There is no statute in express terms to this effect, but it is clearly implied by various enactments regulating the mode of administering the parish funds, and authorising justices of the peace to enforce this obligation upon overseers when they refuse relief to destitute applicants." This applies as strongly when the pauper is resident, without being actually settled, in the parish, as when he is casually passing through it at the time of the accident. It is added, in the same book, "It is true that the parish upon which such demand is made, may in *ordinary* cases get rid of the burthen by an order of removal, when the pauper has a known settlement elsewhere. But relief in the meantime cannot lawfully be denied to the absolutely necessitous, and when the necessity arises from bodily accident, or any sudden calamity which renders the removal of the pauper dangerous or improper, the parish in which the accident has happened, must bear the charge of his support during his illness

incurred will be repaid by the parish in which the pauper is settled, if he was afterwards removed to it. But no such order can be obtained, where the pauper was accidentally in the parish, and has not come there to settle. Without such order, the parish in which the accident happens has no legal claim on the parish in which the pauper is settled; but if an overseer authorizes directly a surgeon to attend a non-resident parishioner, he is liable to the surgeon."

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impose a new liability on any person; its object was merely to establish a mode of rating. "Tenement" and "hereditament," in section 53., are not to be taken in the widest legal sense, but as limited to matters ejusdem generis with "land, house, shop, warehouse, or other building," mentioned just before. These words would have been unnecessary if "tenement" and "hereditament" had been used in the largest sense. And the final clause of sect. 53. speaks of all "messuages, lands, *tenements*, and *hereditaments*," which shall be "held or occupied within such parts of the said parish," &c., evidently contemplating something local and corporeal. [*Patteson* J. That clause refers only to the third of the rates mentioned; but the prior clause must, to make sense of it, be read with a reference to this, for, without such reference, there is no local limit given within which the persons inhabiting or holding any land, house, &c., shall be liable to rate.] Sect. 34. of the former stat., 11 *G.* 3. *c.* 15., which relates to the raising of rates for the purposes of that act, evidently uses the words "tenement" and "hereditament" in the limited sense here contended for; and sect. 33. speaks of "cellars, vaults, and other places, belonging to any house, shop, warehouse, or *tenement*." Sect. 68. of stat. 46 *G.* 3. *c.* lxxxix. gives certain powers to the overseers, "in order to avoid the loss which frequently happens by tenants or occupiers of houses, *tenements*, or *hereditaments*, quitting and removing from the same before the quarter day on which the rates or assessments, charged by virtue of this act, on the said houses, *tenements*, or *hereditaments*" become due. And the two words are used in the same limited sense in sections 69, 70, and 71., which also regard the rates. *Rex* v. *The Manchester*

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Manchester and Salford Waterworks Company (*a*) and *Rex* v. *Mosley* (*b*) are instances in which the word "tenements" has been held to take a qualified sense from the words with which it was associated. In this case very plain words should be pointed out, to burden the owner of the market with charges to which, unless by the local act, he is not liable.

Sir *John Campbell*, Attorney-General, contrà. The only question is, the meaning of "hereditament" in stat. 46 *G.* 3. *c.* lxxxix. *s.* 53.: it cannot be contended that these payments are within stat. 43 *Eliz. c.* 2. *s.* 1. The words in the present act are different from those of the statute referred to in *Rex* v. *The Manchester and Salford Waterworks Company* (*a*), and *Rex* v. *Mosley* (*b*): here the assessments are to be made on all persons who "inhabit, hold, occupy, possess, *or enjoy* any land, house, shop, warehouse, or other building, *tenement or hereditament*;" the words being apparently meant to be taken reddendo singula singulis. It is said that the clause ought not to be construed favourably to the imposing of a new burden; but there is, in principle, no reason against charging the property in question as well as property of other kinds, and the lord, who by stat. 11 *G.* 3. *c.* 15. *s.* 38., is in the situation of a cestui que trust with respect to it, is the person who in justice ought to be charged; not the commissioners, who derive no benefit from it. Not only the maintenance of the poor, but the cleansing and watching of the streets, and repair of the highways, are matters in which the owner of this market has an interest, and

(*a*) 1 *B.* & *C.* 630. (*b*) 2 *B.* & *C.* 226.

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was not removable in consequence of the chargeableness arising from the accident. It is true that that case was decided on the absence of animus morandi; but at least it shews that the charge falls on the parish where the accident happens: and in 4 *Chitty's Burn*, p. 237. (*a*) this remark is made on the case:—"But it is evident that the learned Judge" (*Le Blanc* J.) "could not mean that the expenses incurred in a sickness or infirmity, *produced by sudden accident*, should be defrayed by the pauper's own parish." In *Rex* v. *St. Lawrence Ludlow* (*b*) it was held that, in case of accident, the expenses could not be thrown, by the parish to which the pauper was conveyed, on the parish where he was settled, by making an order of removal and suspending it. There also there was certainly no animus morandi; but the case shews, as before, the liability of the parish where the pauper is. The inference drawn from all the cases in 4 *Chitty's Burn*, p. 237. (*c*) is this;—"The various *dicta* upon this subject seem to establish that a pauper, become so under such circumstances, *obtains a settlement pro tempore*, in the parish where the accident has *left him to be relieved*; and that his settlement in his own parish is suspended till the cause of its interruption is removed." Indeed it is doubtful whether the words of stat. 35 *G.* 3. *c.* 101. *s.* 2., "sickness or other infirmity," comprehend a casualty like this. In ordinary language they could not. And in an earlier statute, in pari materiâ, stat. 22 *G.* 3. *c.* 83. *s.* 38., the cases are distinguished; the words are "meeting with any accident, or being afflicted with any dangerous sickness or bodily

(*a*) Ch. iii. 8. 1. (ed. 26th.)
(*b*) 4 *B.* & *Ald.* 661.
(*c*) Ch. iii. 8. 1. (ed. 26th.)

infirmity."

infirmity." The moral obligation seems here peculiarly to attach to the parish in which the pauper has been resident, and which has had the benefit of his services.

Lord DENMAN C. J. I cannot feel a doubt on this case. There was, as the law once stood, a danger that a pauper might be removed too soon. To prevent this, stat. 35 *G.* 3. *c.* 101. *s.* 2., required that, where the pauper was unable to travel, by reason of sickness or other infirmity (which I take to extend to all infirmities, however produced), the justices should suspend the order; and then the parish to which the suspended order of removal is made is to pay the charges occasioned by the suspension. *Rex* v. *St. James in Bury St. Edmunds* (*a*) and *Tomlinson* v. *Bentall* (*b*) are inapplicable: the pauper here had come to settle. All that has been done is therefore right; and the settlement parish must pay the expenses.

LITTLEDALE J. It is reasonable that these charges during the suspension should be paid by the settlement parish. I cannot assent to the distinction between infirmity produced by sickness and that produced by accident. Any infirmity, however produced, is within the meaning of the act.

PATTESON J. I am of the same opinion. If we held otherwise, we should be acting in contradiction to the object of stat. 35 *G.* 3. *c.* 101. The second section recites that poor persons are often removed during sickness to the danger of their lives. This pauper might have

(*a*) 10 *East*, 25. (*b*) 5 *B.* & *C.* 738.

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been removed, but for the danger to his life arising from this accident. He had come to settle, within the meaning of stat. 13 & 14 *C.* 2. *c.* 12. *s.* 1., and had become chargeable; how, is immaterial. He was therefore liable to be removed, if that could be done without danger. It is the very case provided for by stat. 35 *G.* 3. *c.* 101. If it was illegal to remove, before that statute, it could not be less illegal after it. But then it is said, that the parish in which the accident happens is liable: true; it is so, till the order of removal, whether the pauper be resident there or not. But, if the accident happens in a parish where he is not resident, there is no power of removal, because the pauper has not come to settle within the meaning of stat. 13 & 14 *C.* 2. *c.* 12. *s.* 1. Then it is said that he was casual poor. If casual poor mean a pauper not resident in the parish where he meets with the accident, I agree that he cannot be removed; but if it mean a person meeting with an accident any where, I do not agree. A pauper is never casual poor *in* the parish where he resides; when he happens *to* be in a place where he is not settled, he may perhaps be called casual poor, but I think that he is not so then, properly speaking.

COLERIDGE J. The question is, whether this pauper was casual poor, so as to charge the appellant parish. First, was he removeable? If removeable, he must be so independently of stat. 35 *G.* 3. *c.* 101. Now, before that statute two magistrates might have made an order to remove him; because he had come animo morandi, and was chargeable. Under the circumstances of this case, such removal could not be carried into effect.

Till

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The KING *against* The Inhabitants of OLDLAND.

Till it was carried into effect, the expenses were to be borne by the parish where the pauper was; for every parish must pay for its own paupers. Then stat. 35 *G.* 3. *c.* 101., did not give a power of removal where it did not exist before; but it enabled magistrates to suspend the order, and charge the expenses occasioned by the suspension on the settlement parish. The question then is, under stat. 35 *G.* 3. *c.* 101. *s.* 2., not whether it was proper to make the order, but whether it was proper to suspend it: of that I cannot doubt. This infirmity made just one of the cases provided for.

Order of sessions confirmed.

The KING *against* The Inhabitants of IGHTHAM.

Wednesday, May 4th.

ON appeal against an order of two justices, whereby *John Webb* was removed from the parish of *Ightham* to the parish of *Sundridge*, both in the county of *Kent*, the sessions quashed the order, subject to the opinion of this Court upon the following case: —

The sessions quashed an order of removal which assumed an imperfect contract of apprenticeship; and they stated the following facts for the Court. Pauper's brother worked with *W.*, a carpenter, as apprentice,

The respondents proved a settlement by birth in the appellant parish. The appellants set up a subsequent settlement in the respondent parish under the following

under a verbal contract; on his leaving *W.*, he applied for pauper to be taken in his place. *W.* said he would take no more apprentices unless they would agree to work on his land *as well* as at the carpentry business, saying, "I will have no more apprentices, unless he is agreeable to do other work as well; I will take him to do work as a servant." *W.* occupied three or four acres of hop ground. It was agreed that pauper should live with *W.* three years, to learn the business of a carpenter, and to do any other work *W.* required: pauper to have 9*s.* a week the first year, 10*s.* the second, 11*s.* the third, and to be paid for over work at the same rates. He entered into *W.*'s service in pursuance of the agreement, boarding and lodging at his own expense. The question for the Court was stated to be, whether the pauper acquired a settlement by living with *W.* under these circumstances; if so, the order of sessions to be confirmed; if not, to be quashed.

This Court quashed the order of sessions.

circum-

1826.

The KING against The Inhabitants of LEAMAN.

circumstances. *William Webb*, the brother of the pauper *John Webb*, worked with *Wright*, a carpenter residing at *Ightham*, as an apprentice, for three years, under a verbal contract of apprenticeship, and, in 1804, when the pauper was about twenty years old, applied to *Wright* to take the pauper in his place: to which *Wright* answered "No;" that he would take no more three years' apprentices unless they would agree to work on his land, as well as at the carpentry business. "I will have no more apprentices for three years, unless he is agreeable to do other work as well; I will take him to do work as a servant." *Wright* occupied three or four acres of hop ground. *William Webb* assented; and it was agreed that the pauper should live with *Wright* for three years, to learn the business of a carpenter, and to do any other work he required him to do, and to be paid 9*s.* a week the first year, 10*s.* a week the second year, and 11*s.* a week the third year. It was further agreed that, if the pauper did any over work at any time, he was to be paid for it in addition, according to his rate of wages at the time. *Wright* added that the pauper might have *Sunday* to himself, if he asked leave. The pauper entered *Wright*'s service in pursuance of this agreement, and served the three years, boarding and lodging at his own expense with a journeyman of *Wright*'s.

The question for the opinion of this Court was, whether the pauper acquired a settlement in *Ightham* by living with *Wright* under the circumstances above stated. If the Court should be of opinion that he did, then the order of sessions was to be confirmed; if the Court should be of opinion that he did not, then the order of sessions to be quashed.

Bodkin

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The King against The Inhabitants of Ightham.

Bodkin and *E. Perry*, in support of the order of sessions. It is a question of fact whether there was a hiring and service; and the sessions, by quashing the order, find that fact affirmatively; *Rex* v. *St. Andrew the Great, Cambridge* (*a*). In *Rex* v. *Great Wishford* (*b*) it was said that the line of demarcation was not plain between cases in which this Court was and was not bound by the finding of the sessions: but it appears, from that case, that the finding will be supported unless necessarily wrong. Here the facts shew a hiring and service. The master repudiates the contract of apprenticeship and insists upon the pauper's doing work as a servant; and the pauper assents and works accordingly. *Rex* v. *Combe* (*c*) will be relied upon on the other side: but there it appeared that the alternative of apprenticeship and service had been expressly put to the parties, and the former adopted. In *Rex.* v. *Edingale* (*d*) the Court confirmed the finding of sessions against the contract of hiring and service: there the employment was solely in the trade which was to be learned: and *Bayley* J. said, "If it were a mere question of fact, we ought, before we reverse their decision, to see clearly that there were not sufficient premises to warrant that conclusion." The present case resembles *Rex* v. *Hitcham* (*e*), where the pauper was to learn the trade and also to work in the farming line; and it was held to be a hiring and service. Learning is incident, more or less, to almost all services. The question is, whether it be the primary object. Here the master's language distinctly shewed that it was not. He might have employed the

(*a*) 8 *B.* & *C.* 664.
(*b*) Antè, p. 216.
(*c*) 8 *B.* & *C.* 82.
(*d*) 10 *B.* & *C.* 739.
(*e*) *Bur. S. C.* 489.

pauper

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The King against The Inhabitants of Ingham.

pauper as a servant throughout. The wages, too, are the full wages of an agricultural servant; there is no deduction for teaching. The want of a premium is strong evidence, though not decisive; per *Bayley* J. in *Rex* v. *St. Margaret's, King's Lynn* (*a*). In that case, the absence of a premium and indentures was accounted for by the mother's poverty. In other cases, where the absence of premium has been held not conclusive, there has been usually a consideration tantamount to a premium, as by an abatement in the wages, or a deduction from the earnings; *Rex* v. *Tipton* (*b*), *Rex* v. *Crediton* (*c*), *Rex* v. *Newtown* (*d*). And it may be remarked that, with very few exceptions, this Court has not found that there was a defective contract of apprenticeship, except where the sessions have so found. *Rex* v. *St. Margaret's, King's Lynn* (*a*) and *Rex* v. *Newtown* (*d*) are such exceptions; but there the facts were very strong.

Deedes contrà. The sessions, in this case, do not find a hiring and service: they quash the order of removal, subject to the view to be taken by this Court of the contract legally arising between the pauper and the master. The primary object was learning, as in *Rex* v. *Crediton* (*c*); the service was merely subsidiary. (He was here stopped by the Court.)

Lord DENMAN C. J. This was an imperfect contract of apprenticeship. The case finds the agreement to be that the pauper should live with *Wright*, "to learn the business of a carpenter." The master, if he had not taught

(*a*) 6 *B.* & *C.* 97. (*b*) 9 *B.* & *C.* 888.
(*c*) 2 *B.* & *Ad.* 493. (*d*) 1 *A.* & *E.* 238.

him

him the business, might have been sued. Premium is not essential.

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LITTLEDALE J. This belongs to a class of cases, some of which are very doubtful. But here I think that there clearly was no settlement by hiring and service, but only an imperfect contract of apprenticeship. First, there is a verbal contract of apprenticeship by the brother: and then a proposal that the pauper shall be taken in his place. The master answers that he will have no more apprentices unless they will do other work. That is as much as to say that, if they will do so, he will take them as apprentices. The primary object was that the pauper should be an apprentice, only on terms of also working as a servant: the working, therefore, was subsidiary. That is assented to. There are, indeed, wages; and it is true that this fact agrees better with the supposition of service than with that of apprenticeship. But, under a qualified contract of apprenticeship like this, there might be such a stipulation; and the fact of the pauper taking the place of his brother, who was an apprentice, joined with the express terms used in the negotiation, shews a contract of apprenticeship.

PATTESON J. I think this was an imperfect contract of apprenticeship. It was clearly the pauper's object to be taught; and the master refused to take him as apprentice, unless he would do other work *as well*: and that the pauper assented to; that is, he assented to work *as well* as to be apprentice. It is true that the master would not have agreed unless the pauper had assented to work; but, on the terms of his also

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The KING *against* The Inhabitants of IGHTHAM.

working as servant, he did agree to take him as apprentice.

COLERIDGE J. I agree: but I think the case should not have been sent. If the sessions had found the fact of a hiring and service, I, for one, would not have disturbed their finding. They have probably been prevailed on by importunity to send the case to us. In *Rex* v. *Great Wishford* (*a*) the chairman took the opinion of the sessions whether there had been an imperfect contract of apprenticeship; and they found that there had. I must say that I think it would be better if counsel would not press to have such cases granted.

Order of sessions quashed.

(*a*) Antè, p. 216.

The KING *against* CONNOP, FORBES, and Others.

An indictment for misdemeanor was preferred at the Central Criminal Court; the marginal venue was "Central Criminal Court;" in the body of the indictment the facts were stated to have taken place "at the parish of *St. Mary Lambeth, Surrey*, within the jurisdiction of the said Court." The indictment was removed by certiorari.

Held, that the trial must be at the assizes for *Surrey*.

THE indictment in this case, for misdemeanor, was preferred at the Central Criminal Court. The venue in the margin was "Central Criminal Court to wit;" and, in the body of the indictment, the material facts were laid as having occurred in the parish of *St. Mary Lambeth*, in the county of *Surrey*, within the jurisdiction of the said Court. The indictment was removed into the Court of King's Bench by certiorari.

E. Perry

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The KING against CONNOR.

E. Perry now applied to the Court to order that the trial might take place in *Middlesex* or elsewhere, within the district comprehended in the jurisdiction of the Central Criminal Court. The words "Central Criminal Court," in the margin, and "within the jurisdiction of the said Court," in the body of the indictment, are the substantial parts as to venue; the parish venue is now immaterial, and may be treated as surplusage. It is, in fact, often omitted in indictments in that Court (*a*). [*Littledale* J. It ought not to be.] The venue here may be considered as laid in any part of the district to which the Central Criminal Court Act, 4 & 5 *W.* 4. *c.* 36., extends. By sect. 3. the whole is to be taken as one county for this purpose. [Lord *Denman* C. J. That is with respect to cases tried in that Court. *Patteson* J. If the local venue laid were immaterial, I am afraid the consequence would be that we could not send this case to any county for trial. But I rather think that that venue is not surplusage. *Coleridge* J. What right would a *Middlesex* jury have, at Nisi Prius, to try a fact which appeared to have been done in *Surrey?*] The defendants will be put to great inconvenience, if the case is sent to the distance of thirty miles for trial (*b*).

Lord DENMAN C. J. We need not reject any thing that appears in the indictment, in order to hold that

(*a*) It sometimes happens that the local description, preceding the words "within the jurisdiction of the said Court," is different in different counts, as in *Rex* v. *Curwood*, 3 *A.* & *E.* 815. In that case two counties, *Middlesex* and *Surrey*, were specified, and two parishes in the latter county. The record was made up; and notice of trial was given for *Middlesex*; after which the defendants withdrew their plea; and the case never went to trial.

(*b*) The next *Surrey* assizes were held at *Guildford*.

this

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this case must be tried in *Surrey*. If the offence was committed in that district of *Surrey* which is within the jurisdiction of the Central Criminal Court, the trial might properly have been in that Court. But, the indictment being removed by certiorari, the only question is, whether the case must not be tried in that county in which, by the indictment, the fact appears to have taken place. I am of opinion that it must.

LITTLEDALE J. The indictment being removed, the trial must be in the county in which the offence is laid.

PATTESON J. As soon as the case is removed out of the Central Criminal Court, the venue in the margin becomes a mere nothing, and the common law venue attaches. The venue "Central Criminal Court" has no meaning in any other court.

COLERIDGE J. Concurred.

Rule refused.

In the Matter of the Arbitration between JAMIESON and BINNS and DEAN.

Thursday, May 5th.

Where arbitrators have decided the choice of an umpire by tossing up, the acquiescence of parties, subsequently to the choice, and before the reference is proceeded in, does not render the appointment valid, unless the parties acquiescing have knowledge of all the circumstances under which the choice was made.

Therefore, where one of two arbitrators objected to *S.* as umpire, and afterwards the two arbitrators tossed up, and the other arbitrator won, and named *S.*, and the attorney of one of the parties, knowing that the arbitrators had tossed up, but not knowing that one of them had objected to *S.*, proceeded in the reference, it was held that the irregularity was not cured. And this, though the ground of the arbitrator's objection to *S.* was negatived by affidavit.

DISPUTES having arisen between *Jamieson* on the one side, and *Binns* and *Dean* on the other, they, by agreement, referred all matters in dispute to the arbitration of *Marler* and *Wright*, or to the award and umpirage of such person as they should appoint to be umpire between them. *Marler* and *Wright* appointed *Southam* to be umpire; and he afterwards made his award. In *Michaelmas* term last, Sir *W. W. Follett* obtained a rule, on the part of *Jamieson*, calling upon *Binns* and *Dean* to shew cause why the award or umpirage should not be set aside, on the ground, among others, that the umpire was not duly appointed by the choice of the arbitrators, but that his appointment was decided by chance. Each of the two arbitrators, originally named, had proposed several persons as umpire, but the arbitrators had been unable to agree: *Wright*, the arbitrator named by *Binns* and *Dean*, had proposed, among other persons, *Southam*; but *Marler*, the arbitrator named by *Jamieson*, had objected to *Southam* for reasons stated in the affidavit in support of the rule. *Wright* and *Marler* finally agreed that each should write down two names, that then each should strike out one of the four, and that it should be decided by tossing up, whether *Wright* or *Marler* should choose one of the two remaining names. *Wright* won the

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In the Matter of JAMIESON and BIRDS.

toss, and named *Southam*. *Jamieson* swore that he had never assented to the nomination of *Southam*, and that he proceeded in the reference without being aware of the manner in which he had been appointed. Mr. *Earle*, the attorney who attended the arbitration for *Jamieson*, swore that he himself had never assented to the appointment of *Southam*, but attended under the impression that his client was bound by the appointment. The affidavits filed in answer stated that *Earle*, before he attended the reference, had been informed of the manner in which *Southam* had been appointed, and never objected; and that, on the contrary, he had taken part in indorsing the appointment on the agreement of reference; but it did not appear that he knew of *Marler* having objected to *Southam* as an umpire; and it was denied, by the affidavits, that *Marler* had so objected. The affidavits also negatived the facts upon which *Marler*'s objections to *Southam* were stated, in the affidavits on the other side, to have been founded.

Sir *J. Campbell*, Attorney-General, and *W. H. Watson* now shewed cause. It was decided in *Ford* v. *Jones* (*a*) that the arbitrators must not choose an umpire by chance. But in *In the matter of Tunno and Bird* (*b*) the Court so far qualified that doctrine as to hold that, if a party himself assents to such a method of choice before it actually takes place, he cannot afterwards object to it. Here the agent of *Jamieson*, knowing how the choice had been made, proceeded in the reference: that is a ratification, and must have the same effect as an assent before the choice. [*Patteson* J. *Ford* v. *Jones* (*a*) seems inaccurately reported, as to

(*a*) 3 *B.* & *Ad.* 248. (*b*) 5 *B.* & *Ad.* 488.

the

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the fact of knowledge by the parties (*a*).] The assent of the parties cures irregularities which consist in failing to pursue the precise terms of the reference. Thus, if the umpire is to be appointed before proceeding in the reference, and the arbitrators enlarge the time before such appointment, the appointment is irregular; yet this is cured by the assent of the parties with knowledge; *In the Matter of Hick* (*b*). So in *Wells* v. *Cooke* (*c*), where the umpire was appointed by lot, the argument in support of the award failed only because the knowledge of the parties was not proved; it may be inferred from the report that, if the knowledge had been shewn, the irregularity would have been cured. [*Patteson* J. That is never a very sound argument.]

Sir *W. W. Follett* in support of the rule. The argument urged in support of the award assumes that *Earle* had full knowledge of the facts: but he did not know that one of the arbitrators objected to the umpire; and, if he had known it, he probably would not have proceeded in the reference. [Lord *Denman* C. J. If two persons named for umpire be equally fit, and there be no reason for preferring one to the other, it seems as if an appeal to chance, or some accidental circumstance, must decide the choice.] The parties stipulate for an exercise of the judgment of both arbitrators in the choice, and here they have not had it.

Lord DENMAN C. J. It certainly is not desirable that chance should ever be resorted to: such a proceeding is

(*a*) See the remarks of the learned Judge in *In the Matter of Tunno and Bird*, 5 *B.* & *Ad.* 498.; and the note in the same page.

(*b*) 8 *Taun.* 694. (*c*) 2 *B.* & *Ald.* 218.

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In the Matter of JAMIESON and BINNS.

apt to lead to issues of fact upon the affidavits, which we can hardly decide, and to a waste of time and money. *In the Matter of Tunno and Bird* (*a*), an award was upheld because the parties on both sides, being fully aware of all the circumstances, proceeded with the reference. But here, supposing the attorney's assent to be sufficient to bind the party, an important circumstance was not disclosed, namely, that the umpire had been personally objected to by the arbitrator, who afterwards, most improperly, consented to toss up. That was not brought to *Earle's* knowledge; if it had been, the point now suggested in support of the award would have arisen.

LITTLEDALE J. The facts here were not all communicated, for the attorney did not know that one of the arbitrators objected to the umpire who was chosen.

PATTESON J. I hoped that *In the Matter of Tunno and Bird* (*a*) had settled the law. But the decision there went on the assent with knowledge of all the facts. Without such knowledge, it must not be taken that an assent is valid: in truth it is no assent.

COLERIDGE J. Such a choice can be made good only by consent; and consent can exist only where there is knowledge of all the facts.

Rule absolute.

(*a*) 5 *B.* & *Ad.* 488.

Ex parte PERING.

Thursday, May 5th.

A patent for the exclusive use of an improvement in the invention of anchors contained a proviso for avoiding the patent if the patentee should not supply for his Majesty's service all such articles of the invention as should be required, on such reasonable terms as should be settled by the Lords of the Admiralty. The latter used the invention, but did not take the articles from the patentee. The Court refused to issue a mandamus to them, to settle the terms according to the patent.

ON the 6th of *October*, 1830, letters patent were granted to *Richard Pering* for the exclusive privilege of an invention for improving the construction of anchors. The patent contained a proviso for making void the same, if the patentee, his executors, &c., should not supply, or cause to be supplied, for His Majesty's service, all such articles of the said invention as he or they should be required to supply, in such manner, and at such times, and at and upon such reasonable prices and terms, as should be settled for that purpose by the Lords Commissioners of the Admiralty, for the time being.

Sir *W. W. Follett* now moved for a mandamus commanding the Lords of the Admiralty to settle the prices and terms, according to the patent. The affidavit in support of the rule stated the grant of the patent, and that the Admiralty had had anchors constructed according to the invention, and had refused to give the patentee adequate remuneration. Sir *W. W. Follett* contended that the terms of the patent must be construed as imposing a duty on each side; or that, at all events, the Lords of the Admiralty were not entitled to use the invention instead of making the arrangement contemplated by the patent.

Lord DENMAN C. J. It is clear that this application is not warranted by the terms of the patent. The defendant has supplied nothing.

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Ex parte Perring.

LITTLEDALE J. The claim seems to be in the nature of a quantum meruit for the use of the patent. We cannot grant the mandamus.

PATTESON J. The claim, if valid, must be founded on a contract. But we cannot grant a mandamus to a public board, ordering them to carry a contract into effect.

COLERIDGE J. concurred.

Rule refused.

Friday, May 6th.

STEEPLE *against* BONSALL.

Three pleas were pleaded in bar to a declaration in trespass containing one count, and issues joined on them. By order of Nisi Prius, a verdict was taken for 100*l.* damages, subject to the award of a barrister, to whom the cause and all matters in difference were referred, with power to direct what should be done by the parties.

BY an award made in this case, it was recited that, at the *Derby* Spring assizes 1835, the cause came on to be tried, whereupon it was ordered, by consent &c., that a verdict should be entered for the plaintiff, damages 100*l.*, subject to the award of a barrister, who should be at liberty to direct for whom and for what sum the verdict should be finally entered; to settle all matters in difference between the parties; and to order and determine what he should think fit to be done by either party, respecting the matters in dispute, and in respect of the way claimed by the defendant. The award then went on as follows: "Whereas in the said action three issues

He directed a verdict for the plaintiff on two issues, and for the defendant on the third, adding that, if there had not been the third issue, he should have awarded 1*l.* damages to the plaintiff on the other issues:

Held, that it was not competent to the plaintiff to move for judgment non obstante veredicto on the third issue.

And this without reference to any special clause in the order of reference, restraining the parties from bringing a writ of error, &c.

were

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STEEPLE against BONSALL.

were joined (*a*) between the said plaintiff and the said defendant, one relative to a certain private way alleged to have been used for twenty years and upwards, another relative to a certain public way, and another relative to a certain consent and agreement: now, I do award a verdict for the defendant upon the issue relative to the said consent and agreement, and for the plaintiff upon the other issues: if there had been no issue relative to the said consent and agreement, I should have awarded 1*s.* damages to the plaintiff upon the other issues." The arbitrator then directed the execution of a certain deed. The award was dated *June* 8th, 1835. In *Trinity* term 1835, *G. T. White* obtained a rule nisi for judgment non obstante veredicto on the third plea.

Kelly and *N. R. Clarke* now shewed cause (*b*). If the plea be bad, it was for the arbitrator to give judgment non obstante veredicto; an award is final as to both law and fact; *Ashton* v. *Poynter* (*c*), *Symes* v. *Goodfellow* (*d*). If there be any error in the arbitrator's proceedings, of which the Court will take notice, the objection should be taken by a motion to set the award aside. Supposing this rule to be made absolute, as no damages are awarded, there must be a writ of enquiry, so that the award would be treated as not final, whereas the motion assumes that it is final, for it recognizes the finding on the issues. If the award be not final, there should be

(*a*) The declaration was in trespass quare clausum fregit, and contained only one count. The first two pleas were to the whole declaration; the third (as to the consent and agreement) to a part only; but the Court did not enter into any question arising on the particular form of the issues.

(*b*) Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

(*c*) 2 *Dowl. P. C.* 651.; 3 *Dowl. P. C.* 201.

(*d*) 2 *New Ca.* 532.

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Stegrex against Bonsall.

a new trial, not a judgment non obstante veredicto. Indeed, as there are no damages, there cannot be judgment for the plaintiff, but only a venire de novo, *Clement* v. *Lewis* (a), *Tidd's Practice*, 920, 921, (9th ed.). In *Moseley* v. *Davies* (b) the Court of Exchequer refused to arrest judgment on an issue directed by the equity side of the Court, considering that it would be incompatible with established usage, and with the object of such issues. A judgment non obstante veredicto may be moved for at any time before judgment is actually entered up: a motion to set aside such an award as this must be made, by analogy to stat. 9 & 10 *W.* & *M.* c. 15. s. 2., before the end of the term after the publication of the award (c).

Sir *W. W. Follett* and *G. T. White*, contrà. The Court will not allow a judgment to stand, upon a record substantially wrong. [*Wightman*, amicus curiæ, mentioned that, in a case before the Judges of *Chester*, where a cause had been referred under the usual order, the rule of reference was ordered to be amended, after an award in favour of the plaintiff, by striking out the clause restraining the parties from bringing a writ of error (d), on the ground of hardship and probable inadvertence, the defendant stating that, at the time when the cause was referred, it did not occur to him that the

(a) 3 *B.* & *B.* 297. (b) 11 *Price*, 162.

(c) See dictum of *Parke* J. in *Macarthur* v. *Campbell*, 5 *B.* & *Ad.* 519.; *Allenby* v. *Proudlock*, 4 *Dowl. P. C.* 54.

(d) Some discussion arose, in the present case, as to the effect of such a clause; and it did not distinctly appear, by the recital in the award or by affidavit, what the precise words of the rule of reference here were; but the Court decided the question on the general power of the arbitrator, independently of any clause restraining the parties from bringing a writ of error.

order

1836.

STEEPLE against BOTSALL.

order of reference would contain such a clause (a).] Here it may be understood that the arbitrator has put the facts on the record for the judgment of the Court; else his statement of what he would have found is nugatory. Why should the parties be prevented from taking the opinion of the Court as to the legal effect of the finding in the award? The case *In the matter of Mackay* (b) goes beyond the present. The judgment is the act of the Court, not of the arbitrator. The Court will not allow an erroneous judgment to be recorded. [*Coleridge* J. The Court does not of itself take notice of what is on the record: there must be thousands of defective records on which judgment has passed.]

Cur. adv. vult.

Afterwards, in this term (*May* 9th), Lord DENMAN C. J. delivered judgment as follows: — We think that it was not open to the plaintiff to come to the Court in this case. The arbitrator's power was complete and final. He had power to do what the Court could do; and his award therefore puts an end to the proceedings.

Rule discharged.

(a) The cause was *Fairfield* v. *Wright*. It was afterwards argued in error in this Court, *Wright* v. *Fairfield*, 2 *B. & Ad.* 727.

(b) 2 *A. & E.* 356.

1836.

Friday, May 6th.

HOUGH and Others *against* MAY.

To assumpsit for work and labour in making a railing, defendant pleaded, that before the action *he had paid to plaintiff* the sum of 8*l.* 11*s.*, *and plaintiff had received and accepted* the same, in payment and discharge of 8*l.* 11*s.* Replication, that *defendant did not pay to plaintiff* the said sum of 8*l.* 11*s.* in manner, &c.:

Held, that the defendant did not support his issue, by shewing that, before the action, he had sent plaintiff a cheque on his banker for 8*l.* 11*s.*, stated in the body of the cheque to be "balance account railing;" and that plaintiff held such cheque at the commencement of the action. A cheque so delivered, to operate as payment, must at any rate be unconditional.

And (per *Littledale* J.) a party to whom a cheque is sent may commence an action before he sends it back:

Held also, that it was no misdirection to leave it to the jury, only, whether the plaintiffs received the cheque as money.

ASSUMPSIT for work and labour, and materials found, and on an account stated. Second plea, as to 8*l.* 10*s.*, parcel &c., that the defendant, after the making of the promises &c., and before the commencement &c., to wit, on &c., "paid to the plaintiffs the sum of 8*l.* 11*s.*, and the plaintiffs then received and accepted the same, in payment and discharge of the said sum of 8*l.* 11*s.* in the introductory part of this plea mentioned." Verification. Replication, "That the defendant did not pay to the plaintiffs the said sum of money in the said second plea mentioned in discharge of the said sum of 8*l.* 11*s.*," in manner &c. Conclusion to the country. There were other issues on the record.

On the trial before the Under-Sheriff of *Middlesex* (*April* 14th, 1836), it appeared that the action was for an iron railing put up by the plaintiffs for the defendant. The defendant's case, in support of the issue on the second plea, was that he had sent to the plaintiffs, on the 7th of *November* 1835, a cheque drawn by the defendant on his bankers for 8*l.* 11*s.*, which cheque had remained in the plaintiffs' hands since then, the action having been commenced on the 10th of the same month. The plaintiffs produced the cheque upon the defendant's calling for it. It was as follows:

"Messrs.

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HOUGH against MAY.

Messrs. *Dorrien* & Co. 7 *Nov.* 1835.

Pay Messrs. *Hough* & Co. balance account railing or bearer 8*l.* 11*s.*

£8 11*s.* 0*d.* *William May.*

On the 13th of *November*, the plaintiffs' attorney wrote to the defendant, stating that, as the defendant had not sent the amount, as requested in a letter of the 6th, he had issued a writ; adding, "the cheque you sent to Messrs. *Hough* is ready to be returned." No question was raised as to the date of the receipt of the cheque by the plaintiffs; but they contended that this evidence did not sustain the issue on the defendant's part. As to this, the under-sheriff desired the jury to say whether the plaintiffs received the cheque as money. The jury found that they did not; and, the other issues being found for the plaintiffs, they had a verdict for 8*l.* 18*s.*; the under-sheriff reserving leave to move to reduce the verdict to 7*s.*, if the Court should be of opinion that the cheque was payment. In this term *T. F. Ellis* obtained a rule for reducing the damages accordingly, and also for a new trial on the ground that the question was improperly left to the jury.

Petersdorff now shewed cause. It is not necessary to discuss what would have been the effect of the Defendant's sending a cheque in the ordinary form to the plaintiffs, and their retaining it without presentment. Here the cheque purports to be drawn for the balance: the plaintiffs could not, at any rate, be bound to present a cheque so drawn, as the presentment would operate as an admission by them that the balance was only 8*l.* 11*s.* (He was then stopped by the Court.)

T. F. Ellis

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T. F. Ellis contrà. The plaintiffs would not be bound by the words, any more than a party could be held to admit any fact stated on a bank note handed to him and used by him. No authority can be shewn for maintaining that such a document would be evidence against the plaintiffs. Then the case is the same as with a common cheque; and the effect of the production of such an instrument in the hands of the plaintiffs is explained by *Patteson* J. in *Pearce* v. *Davis* (*a*). "It operates as payment, until it has been presented and refused; and even if payment of it be refused, the refusal must be proved to have taken place before action brought." If the plaintiffs were to recover in this action for the amount, they might issue execution, and then present the cheque, or they might hand it over for a valuable consideration, and thus receive payment twice. But, besides, the plaintiffs on this record are estopped from disputing that they received the cheque as payment. The plea alleges, first, that the defendant paid the 8*l.* 11*s.* in payment and discharge &c.; secondly, that the plaintiffs received and accepted the same in payment and discharge &c. Of these two allegations, the first only is traversed: the only question therefore is, whether the defendant sent the cheque as payment, as to which there can be no doubt; for he must have sent it for the purpose of its being used in the ordinary way; and, if used in the ordinary way, that is, if presented and cashed, it would have satisfied the debt; and the defendant must have understood that, the moment he appropriated the sum at his bankers, by handing over the cheque, the debt was so far

(*a*) 1 *M.* & *Rob.* 365. See *Boswell* v. *Smith*, 6 *C.* & *P.* 60.

satisfied,

satisfied, in default (according to *Patteson* J. in *Pearce* v. *Davis* (*a*)) of subsequent presentment and refusal. If the plaintiffs objected to the form of the cheque, they should not have accepted it in payment, as they admit themselves on the record to have done. But, if this be not conclusive from the nature of the transaction, at any rate, the question for the jury was, not whether the plaintiffs received the cheque as money, but whether the defendant so paid it. There was therefore a misdirection.

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HOUGH against MAY.

Lord DENMAN C. J. The question is, whether the plaintiffs have been paid 8*l.* 11*s.* To make the delivery of a cheque a payment, it should at least be unconditional. As this cheque is framed, it would be evidence against the plaintiffs, if they made use of it. The case might be different, if it were unconditional; but, even then, the party receiving it would be entitled to exercise his discretion as to presenting it.

LITTLEDALE J. The case would be different, if the plaintiffs had received the cheque as money; but all that appears is, that it was sent to them by the defendant. They say, "We never authorised the sending of this cheque to us, and we shall commence an action." Perhaps a party ought, under such circumstances, to send the cheque back: but here the plaintiffs offer to do so; and they were not bound to suspend the commencement of the action till they had returned the cheque. Again, I rather think that the condition inserted in the cheque might be evidence against the plaintiffs, if they pre-

(*a*) 1 *M. & Rob.* 365.

sented

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HOUGH against MAY.

sented it. On both grounds, therefore, this rule must be discharged.

PATTESON J. The rule must be discharged on both grounds. On this issue, it is not sufficient to prove that the cheque was sent by way of payment; but it should be shewn that the circumstances were such as would make the cheque a payment by the defendant to the plaintiffs. To call upon the plaintiffs to present such a cheque, is like requiring a party, to whom money is paid, to give a receipt in full for all demands. I do not say that every thing written upon the cheque would be evidence against the plaintiffs; but here the words are, "balance account." The plaintiffs could not safely use such a cheque.

COLERIDGE J. Suppose this cheque had been presented, and it had been afterwards a question for a jury whether the plaintiffs had been paid in full. They would see that, before the action was brought, the plaintiffs had accepted and made use of a cheque professedly given for the then balance. The defendant must have intended the cheque to have that effect; and, the question that arises on this record being whether the defendant had made the cheque money, the form of the cheque prevents its having that operation.

Rule discharged.

MARY AGNES SILK *against* HUMPHERY, Esquire, and PEEK, Esquire.

Friday, May 6th.

In an action against the sheriff, for a penalty under stat. 32 *G.* 2. *c.* 28. *ss.* 12, 1, for taking plaintiff, when arrested, within twenty-four hours, to prison, the plaintiff not having refused to be carried to a safe and convenient dwelling-house of her own nomination, defendant pleaded that he informed plaintiff that she might be carried to a safe &c.; that plaintiff thereupon consented to be carried to the dwelling-house of *L.*; that defendant carried her thither accordingly, and offered to permit her to remain there for the rest of the twenty-four hours, but the plaintiff then requested to be taken to prison:

Held, on motion for judgment non obstante veredicto, a good plea, the circumstances being equivalent to a refusal:

Held, also, issue being joined on the allegation of the consent to go to *L.*'s house, that the consent to be proved was not such consent as a person would give who had the option of being at large; but that the question was, whether plaintiff consented to go to the particular house, as a person would consent, who was obliged to be in confinement somewhere:

Held, also, that the fact of the sheriff suggesting *L.*'s house, did not prevent the consent from being free, within the meaning of the issue.

The sheriff is intitled to exercise a reasonable discretion in determining whether a house, nominated by a prisoner under arrest, as a safe and convenient dwelling-house, be a safe house for the custody of the prisoner.

If a prisoner request to be taken to a house for the purpose only of consulting a person there, that is not a nomination of a house within the statute.

DEBT for the penalty of 50*l.* on stat. 32 *G.* 2. *c.* 28. *ss.* 12. and 1. The declaration stated the issuing of a capias out of this Court, at the suit of *Henry Morland* against the plaintiff, indorsed for bail; its delivery to the defendants, being sheriff of *Middlesex*, to be executed; that the defendants, by virtue thereof, took and arrested the plaintiff, and had and detained her in custody at the suit of *Morland;* and, by virtue &c., carried the plaintiff, so arrested, &c., to a certain gaol or prison, within twenty-four hours from the time of the said arrest, though she, the plaintiff, did not refuse to be carried to a safe and convenient dwelling house, of her own nomination or appointment, within three miles from the place where the plaintiff was so arrested; such place not being a city, borough, corporation, or market town, and such dwelling house not being the house of the plaintiff, contrary to the form &c.: whereby, and by force &c., the defend-

ants

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ants forfeited and became liable to pay for the said offence to the plaintiff, being the party thereby aggrieved, the sum of 50*l.*, &c.

Plea. That the defendants, at the time of the arrest, informed the plaintiff that she might be carried to a safe and convenient dwelling house, of her own nomination or appointment, within three miles from the place where she was so arrested, such dwelling house not being the house of the plaintiff; and that the plaintiff thereupon consented and agreed to be carried to the dwelling house of one *William Levy*, and that the defendants accordingly carried the plaintiff to the said dwelling house of the said *W. L.*, and were then ready and willing, and offered, to suffer and permit her to remain and continue in the said last-mentioned dwelling house for twenty-four hours from the time of the said arrest; but that the plaintiff, afterwards and whilst she was at the said dwelling house of the said *W. L.*, and within twenty-four hours from the time of the said arrest, to wit, &c., requested the defendants to carry her from the said last-mentioned dwelling house to the said gaol or prison in the declaration mentioned; whereupon the defendants, in compliance with the said request of the plaintiff, and by her express direction, did carry her to the said gaol or prison, within twenty-four hours from the time of the said arrest, as in the declaration mentioned: verification. Replication, That the plaintiff did not consent and agree to be carried by the defendants to the house of the said *W. L.* in manner and form &c. Conclusion to the country. Similiter.

On the trial before *Coleridge* J., at the *Middlesex* sittings after *Easter* term 1835, the defendant's counsel began,

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began, and called a witness who was present at the time of the arrest, and who stated, that *Hulland*, the officer who made the arrest, told the defendant she must go to prison, or find some one to bail her; to which she answered, that she did not know that she had any friend to bail her, and that Mr. *Copeland* was her attorney; that she sent a note to *Copeland*, the answer to which was that he could not come; that *Levy's* name was mentioned; that the plaintiff wished to remain in the house where she was arrested, but *Hulland* said he could not wait any longer, he did not wish her to go to his house, but he would recommend her to go to *Levy's* in *Newman Street*, as it was near to *Morland's*, and his own house was distant from it; that the plaintiff went to *Levy's* willingly; that the witness called a coach at her request; that she expressed no wish to go any where else; that no constraint was used by *Hulland*; and that they remained two or three hours at the house where she was arrested for the accommodation of the plaintiff. Another witness called for the defendants stated, that the plaintiff wished to go to *Copeland's*, but *Hulland* would not let her, and would only let her go to a lock-up house. A witness for the plaintiff stated that *Copeland*, in his answer, had desired the plaintiff to go to his house; and that, on the plaintiff's requesting to go thither, the bailiff refused, and said she must go to prison, and that the men would have enough to do, if they took prisoners over the town, adding, "I'll take her to *Newman Street*, which is handy for her friends to see her." The learned Judge told the jury, that the only question for them was, whether the plaintiff consented and agreed to go to *Levy's*; that the words of the issue could not mean

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that she was delighted to go; that, to whatever house she went, she would have felt some reluctance; that a natural disinclination to go was to be expected in a female so circumstanced; that the question was, whether she went to that particular house unwillingly, or wished to go to another house; that the sheriff had a right to have a voice in the selection of a house, and might not have thought *Copeland*'s a safe house. And he added, according to the note of the plaintiff's counsel (*a*), that, if the plaintiff meant to stand on the statute, she ought to have said, "Now I have named a convenient house, I will go for the penalty." Verdict for the defendants.

In *Trinity* term, 1835, *Knowles* obtained a rule for a new trial, on the grounds of the verdict being against evidence, and of misdirection; or for judgment non obstante veredicto.

Alexander now shewed cause. First, the verdict was supported by the evidence. The issue was, whether the plaintiff went to *Levy*'s house willingly. There was express evidence that she did so; and the replication admits that she had notice of her privilege of nomination. It is true that the officer had previously refused to take her to *Copeland*'s, who was her own attorney. He was entitled to object to that, inasmuch as he might consider it an insecure place, and in that point of view he would be justified in not incurring any risk of escape; besides which, it does not appear that she had named it as a house of custody. It is also true that the officer named *Levy*'s house, with his own, to the plaintiff;

(*a*) See pp. 965, 972, post.

but

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but her choice of *Levy's* house afterwards was not the less made by her consent and agreement: no other house was excluded, and there was direct evidence that no compulsion was used. Secondly, the jury were rightly directed. The issue was, whether the Plaintiff went to *Levy's* house with her own consent and agreement; and so the jury were distinctly told. Nor can any valid objection be made to the construction put upon the act by the learned judge. Thirdly, as to judgment non obstante veredicto. On this record, assuming the plaintiff's consent to go to *Levy's* house to have been proved, the sheriff has incurred no penalty. *Hutson* v. *Hutson* (*a*) was cited on moving for the rule. That was a motion to set aside a judgment and execution on a warrant of attorney, on the ground that it had been executed by the defendant while in custody at the plaintiff's suit, there being only the plaintiff's attorney present, though the defendant declined sending for his own attorney, and said he was satisfied with the presence of the plaintiff's attorney. Lord *Kenyon* said that there was great weight in the observation that the defendant should be considered incapable of waiving the benefit of the rule. In fact, however, the rule was not made absolute, except upon a denial by the defendant of the facts sworn to on the part of the plaintiff, which constituted his excuse. In *Gillman* v. *Hill* (*b*) the Court refused to set aside a judgment on a warrant of attorney, where it appeared that the defendant had executed it without having his own attorney present, because he had been informed that it would be void; Lord *Mansfield* saying, "that no rule of the Court

(*a*) 7 *T. R.* 7. (*b*) 1 *Cowp.* 141.

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shall be made an instrument of fraud." From these cases it appears that the rule (*a*) requiring the presence of the defendant's attorney may be dispensed with by the defendant's express assent, or by conduct from which his assent may be presumed. In *Walker* v. *Gardner* (*b*) a judgment was set aside because the attorney who attended on the part of the defendant had been brought by the plaintiff's attorney, and had not been previously known to the defendant. But that is a very different case from the present; and, though *Taunton* J. there adopts Lord *Kenyon*'s remark before mentioned, in *Hutson* v. *Hutson* (*c*), the rule cannot be considered inflexible. *Dewhirst* v. *Pearson* (*d*) is not applicable; there it was held that the mere submission of the prisoner did not amount to a consent, and that he could not be said to have "refused" to be carried to a safe and convenient dwelling house till the officer had requested him to nominate. So in *Simpson* v. *Renton* (*e*) it was said that there could be no refusal by the prisoner till he had been requested to nominate; and that a mere omission by him to nominate did not authorize the officer to carry him to gaol. But here is an express assent to the particular house. Further, the plaintiff, having assented, does not appear on the record to have been "aggrieved," which is indispensable to her right of action under sect. 12. of stat. 32. *G.* 3. *c.* 28. The Courts have required that this essential ingredient should appear, in many cases which have been decided on statutes using similar

(*a*) See *R. Hil.* 2 *W.* 4. I. 72. 3 *B.* & *Ad.* 384.; and, for the earlier rules, see *Jervis's New Rules*, p. 61. note (*v*), 3d ed.

(*b*) 4 *B.* & *Ad.* 371.

(*c*) 7 *T. R.* 7.

(*d*) 1 *C.* & *M.* 365. *S.C.* 3 *Tyrwh.* 242.

(*e*) 5 *B.* & *Ad.* 35.

language;

language; as *Rex* v. *Ingleton* (*a*), and *Rex* v. *Dewhurst* (*b*), on stat. 5 & 6 *W. & M. c.* 11. *s.* 3.; *Rex* v. *The Justices of Essex* (*c*) (confirmed by *Rex* v. *The Justices of the West Riding* (*d*)) on stat. 55 *G.* 3. *c.* 68. *s.* 3.; *Rex* v. *Blackawton* (*e*), on stat. 55 *G.* 3. *c.* 51. *s.* 14.: which cases are confirmed by the distinctions pointed out by the Court in *Rex* v. *The Justices of Somersetshire* (*g*), on stat. 17 *G.* 2. *c.* 38. *s.* 4.

Knowles, contrà. First, the verdict is against the evidence. It cannot be contended that the plaintiff has no remedy unless she has used bodily force to resist. There was a case of compulsion, short only of that. She was not allowed to go to *Copeland*'s house. Was his house otherwise than "safe and convenient," because he was her attorney? The object of the act is, that the prisoner may have the opportunity of consulting with his own attorney, in order to procure bail. Secondly, there was a misdirection. The learned judge told the jury that, if the plaintiff meant to stand on the statute, as to her nominating *Copeland*'s house, she ought to have insisted on it expressly, and have said that she would go for the penalty. That is contradicted by *Simpson* v. *Renton* (*h*); the proposal to nominate must come from the officer. [*Coleridge* J. If I made that remark, I must have coupled it with others in explanation. The plea alleges that the defendant did give the information; which is not traversed.] The prisoner is not bound to tell the officer that he will

(*a*) 1 *Wils.* 139. (*b*) 5 *B. & Ad.* 405. *S. C.* 2 *N. & M.* 253.
(*c*) 5 *B. & C.* 431. (*d*) 7 *B. & C.* 678.
(*e*) 10 *B. & C.* 792. See *Batcheldor* v. *Hodges*, antè, p. 592.
(*g*) 7 *B. & C.* 681. note (*a*).
(*h*) 5 *B. & Ad.* 85.

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go for the penalty; he may know nothing about it. [Lord *Denman* C. J. Suppose the judge merely said, the demand must be such as to bring to the officer's mind that he will be liable to the penalty if he refuse.] The learned judge also said, that the sheriff had a right to have a voice in the selection of the house; but the statute gives the nomination to the prisoner. [*Coleridge* J. I meant merely that he had a right to exercise a judgment whether it was safe and convenient.] Thirdly, the plaintiff is entitled to judgment non obstante veredicto. She could not waive her right. The object of stat. 32 G. 2. *c.* 28., is the "relief of debtors with respect to the imprisonment of their persons:" and the preamble of sect. 1. recites that "many persons suffer by the oppression of inferior officers in the execution of process for debt, and the exaction of gaolers to whom such debtors are committed." Then the enactment in the same section forbids the officers to take a prisoner, who has not refused to be carried to a house named by himself, to prison, for twenty-four hours, even though such prisoner may prefer a prison to a lock-up house. Lord *Kenyon*'s dictum in *Hutson* v. *Hutson* (*a*) justifies this construction. [*Littledale* J. That case, as well as some others cited, was on an application to the summary jurisdiction of the Court under its own rule; this is an action for a penalty.] The courts favour an extensive application of the rule. In *Waraker* v. *Gascoyne* (*b*) it was held that a party was protected by it as a prisoner, though only within the rules. So, in *Parkinson* v. *Caines* (*c*), of a prisoner in the custody of the marshal.

(*a*) 7 *T. R.* 7.
(*b*) 2 *W. Bl.* 1297.
(*c*) 3 *T. R.* 616.

Lord

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SALE against HUNTRISS.

Lord DENMAN C. J. The replication admits that the plaintiff was informed that she might be carried to a safe and convenient dwelling house of her own nomination. It is suggested that the jury were misdirected. They were told that the refusal of the plaintiff must be more than her natural repugnance to go to any place of confinement. Putting a fair construction on this charge, I think the direction perfectly correct. She is not to go to prison till she has refused to nominate: she should then tell the officer, you must take me to such and such a house. She need not use the very words of the act; but she must name a safe and convenient house. If the jury think she has done so, and that the officer has improperly refused, he is liable to the penalty. It seems to be supposed that the attorney's house was assumed not to be a safe and convenient dwelling house, because it was not a place of custody. I do not think it necessary that the house named should be a lock-up house. If there were any house named, which was safe and convenient, I think the officer would not be justified in refusing. Then it is said, that there was a miscarriage on the part of the jury, they having found that she consented to go to *Levy*'s house, whereas she only went to avoid a worse evil. She was under arrest; and it is said that a choice was allowed her only between going to *Levy*'s house and another. It was a question for the jury, whether she chose freely; her choosing in order to avoid prison could not make it less a free choice. The jury therefore were justified. They had to inquire as to the consent, not of a party who could go at large, but of one who was to be confined in some place or other. Then comes the important question upon the record:

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Silk against Hounsome.

It is said that the plaintiff could not divest herself of her own remedy; that, if she did not expressly *refuse* to nominate a house, her consent to go to prison came to nothing; for that there was no power to take her thither, in the absence of such a refusal. But the question is, whether this plea be not equivalent to an allegation of her having refused to go to a house nominated by herself. Suppose the officer to say, I will not now take you to prison; I will compel you to stay here. What right could he have to insist on that? Or why was he to incur the expense of her remaining at *Levy's* house, after she had desired to quit it? She refuses to remain at the house which she has nominated; that is the same as if she refused to nominate. The plea therefore is good.

LITTLEDALE J. I am of opinion that this rule must be discharged. As to the question, whether the verdict was against the evidence, the question for the jury was whether the plaintiff consented to go to *Levy's* house. It was not necessary that she should use any particular form of consent. But it is said that she had no choice, and that, therefore, she did not consent. She proposed to go to the house of her own attorney. I think, as the learned Judge said to the jury, that the sheriff has so far the control as to be entitled to make a reasonable objection. And it seems to me that the attorney's house is not a safe and convenient house; for, if the prisoner's friends know that the prisoner is at a place to which they have access, they may attempt a rescue: whereas, if the prisoner be taken to the house of a disinterested person, that may be as convenient as a lock-up house. But, in fact, it does not appear that the

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the plaintiff asked to go to the attorney's house for the purpose of remaining there during the twenty-four hours. She seems to have wanted only to consult him. And, though the attorney might be willing to give her advice upon her going to the house, yet, on the whole, I do not think the sheriff was bound to assent to the proposal. Then two other houses were discussed; and, of these, she seems to have preferred *Levy*'s. She named none herself: the officer named both. I think the jury were warranted in their verdict. As to the direction to the jury, the principal objection seems to be, that the learned Judge intimated that the sheriff might nominate the house. But I do not consider that what he said amounted to that. Then as to the question on the record. The declaration is quite proper. On the plea, the question arises whether it is a sufficient answer to the declaration, that the plaintiff, being informed that she might nominate a house, chose *Levy*'s house, and afterwards requested to be taken thence to prison, it not being alleged that she refused to nominate a house. Does the plea falsify her non-refusal? Did she, upon the statement in this record, refuse? She does refuse, if she desire to be taken to prison from the house which she has nominated. The plea therefore falsifies the non-refusal sufficiently. Then it is argued that, in several cases, this Court has kept a strict watch, and rightly, to secure its own rules being attended to for the protection of prisoners. But this is an action upon the statute; and it is answered by shewing that the party was taken to the house named by herself, and thence, at her own request, to prison. Under the rules of this Court, it is said, a prisoner has not been allowed to waive his own rights. That question does

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does not arise here. Under the statute, a prisoner may abandon his right to nominate a house, and, if he do abandon it, he is to go to gaol. The plea is therefore good.

PATTESON J. I think this rule must be discharged. The only question for the jury was, whether the Plaintiff consented to go to *Levy*'s house. It is admitted that she was informed that she had a right to nominate. But, Mr. *Knowles* says, the finding of the jury, that the Plaintiff consented to go to *Levy*'s, is against the evidence; not because she was removed, and resisted the removal by force (and that, indeed, is not necessary), but because she did not go to *Levy*'s house till she had found that the officer would not take her to a house which she had named. That assumes the fact that she had named some safe and convenient dwelling house. But this assumption is not justified by a fair construction of the evidence. She does not appear to have required to go to *Copeland*'s house, as a house to stay at, but because she wanted to consult him. For what is the answer made, when she desired to go thither? One of the men said, "We should have enough to do, if we took prisoners all over the town." It is clear that officers are not bound to take prisoners to every house to which they wish to go for any purpose whatever, but only to a safe and convenient dwelling house, for the purpose of their remaining there during the twenty-four hours. And the Plaintiff did not require to go *so* to *Copeland*'s. There was, therefore, so far, no constraint; for she had named no house. Then the officer's own house is proposed; but it was said that that was too far from *Morland*'s house, and, therefore,

not

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not likely to be convenient. Then she was told that *Levy's* house was near, and she did not refuse this. The verdict is, therefore, not against the evidence. But it is contended that there was a misdirection. I cannot see that there was. The substance of the direction seems to have been, that the jury must be satisfied with the proof of such consent as would be given, not by a person who had the choice of staying at home, but by one who must, at any rate, be kept in safe custody. That is perfectly correct. It is also perfectly correct to say that the officer ought to have a voice in choosing the house. If not, a house might be chosen where a rescue was easy. Then as to judgment non obstante veredicto. It is on the record that the defendants told the plaintiff that she might be carried to a safe and convenient dwelling house, that she, thereupon, consented to go to *Levy's* house (which is the same as if she had nominated that house), and that she requested to be taken from thence to prison. Thus she countermanded, as it were, her previous nomination. It is said that the condition of a prisoner, with regard to the statute, is like his condition with regard to the rule of Court, which was referred to, and that he cannot waive his right. In some sense, I agree to that. Perhaps it might not be sufficient for a prisoner to say, "I know the act; but I do not wish to avail myself of it;" though, indeed, it might be said, that even this was very like a refusal to nominate: it is, however, difficult to say that a prisoner can waive the benefit of the act. But the act leaves him an option. It enacts merely that he shall not be taken to prison within the time unless he refuse to be carried to a house of his own nomination. He may refuse in many ways. He may nominate and then refuse to go:

or

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or he may refuse to nominate; or he may nominate and go, and then refuse to stay. The last is the case now before us; and it is, in effect, a refusal to nominate. As to the question, whether the record shews that the plaintiff is a party aggrieved, I need not discuss it. If the plea be bad, she is a party aggrieved: if it be good, she is not.

COLERIDGE J. I think the verdict should not be disturbed. It is contended that the prisoner did not consent to go to *Levy*'s house till her reasonable request to go to *Copeland*'s was refused. But she never dreamed of going to *Copeland*'s as an intermediate house to stay at till her going to prison. *Copeland* was sent for by her, and would not come, but sent her a message, proposing that she should come to him. The answer, given to the request which she thereupon made, shews the real effect of that request. That being so, she had not nominated a safe and convenient dwelling house. The officer then names two, and suggests, as a reason for her preferring *Levy*'s house, that it is nearer to *Morland*'s, and one from which she may send to her friends. Then the officer says she went willingly. And she therefore consented, in the only sense in which the issue can be understood. It would not have been a consent, in the case of a perfectly free person; but, keeping in view her situation, it appears from the evidence on both sides that she went of her free will. As to the supposed misdirection, I have no note of what I said, the day happening to be one on which, owing to the state of business, I was pressed for time, and could not take a note, as I usually do. But, with respect to the remark that the sheriff is intitled

titled to have a voice in the selection of the house, I adhere to it. It is to be safe; that is, safe for the sheriff, not the prisoner. As to the plea, I think it scarcely admits of a question. The Plaintiff is informed that she may be carried to a safe and convenient dwelling house of her own nomination; she consents and agrees to go to *Levy*'s house: when she is there, the defendants offer to let her remain for the rest of the twenty-four hours; she refuses, and requests to go to prison. If that be not a good answer, in what a condition are sheriffs placed? Would the officer have been justified in keeping the plaintiff at *Levy*'s house? If not, the plea is an answer.

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Rule discharged.

MORTIN *against* BURGE.

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On the trial of a cause, a verdict was taken for 3000*l.* subject to a reference, the arbitrator to direct a verdict for plaintiff or defendant, as he should think proper; and to determine all matters in difference, except as to costs, the settlement of which was provided for by the order of reference. The arbitrator directed a verdict to be entered for plaintiff, (not saying for how much,) and that defendant should, at a time and place named, pay plaintiff or his attorney 260*l.*:

Held, an uncertain award.

THIS cause came on to be tried at the *Maidstone* Spring assizes, 1835, when a verdict was taken for the plaintiff, damages 3000*l.*, costs 40*s.*, subject to the award of an arbitrator, who was empowered to direct a verdict to be entered for the plaintiff or defendant, as he should think proper, and to whom all matters in difference between the parties were referred, to order and determine what he should think fit to be done by either of them respecting the matters in dispute. Each party was to pay his own costs of the cause and reference, and the expenses of the award in equal moieties;

and

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and power was given to the arbitrator to enlarge the time for making his award. The arbitrator made and published his award, dated 9th of *December* 1835, and, after reciting the order, and certain enlargements of the time, he awarded as follows: — "That a verdict shall be entered in the said cause for the plaintiff; and that the said *George Burge* shall and do, on the 19th day of *December* instant, between the hours" &c. "well and truly pay or cause to be paid unto the said *Thomas Martin* or his attorney, at" &c., "the sum of 260*l.* 12*s.* 6*d.* of lawful money of *Great Britain*. In witness" &c. A rule was obtained in the next term, *January* 29th, for setting aside the award, on the grounds, first, that the time for making it had not been properly enlarged; and, secondly, that the award was uncertain.

Platt and *Channell* now shewed cause. First, no objection can be urged which does not appear on the face of the award, the application not having been made within the first four days of the term after the award was published. [*Littledale* J. For many years after I came to the bar, no objection of this kind was heard of. I do not think there is any such rule on the subject as the plaintiff would insist upon.] *Ramsthorn* v. *Arnold* (*a*) shews the practice on the subject. The award itself is sufficiently certain, when read in connection with the order of reference. No discretion is given to the arbitrator as to costs. Nothing appears to which his direction, for the payment of 260*l.* 12*s.* 6*d.*, can apply, except the amount of the verdict.

(*a*) 6 *B.* & *C.* 629. See *Macarthur* v. *Campbell*, 5 *B.* & *Ad.* 518, 2 *A.* & *E.* 52.; *Allenby* v. *Proudlock*, 4 *Dowl. P. C.* 54.

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Ogle, contra. The reference is of the cause and all matters of difference. The verdict was taken for 3000*l.* Consistently with this award it might be meant that the verdict should stand for that sum, and 260*l.* 12*s.* 6*d.* be paid for the other matters in difference. If it was to be paid as recovered by the verdict, the arbitrator ought not to have fixed a day for the payment.

Lord DENMAN C. J. I am at a loss to say, upon this award, whether the arbitrator meant that the 260*l.* 12*s.* 6*d.* should be substituted for the nominal verdict taken, or be paid in respect of matters in difference. I think the award cannot be supported.

LITTLEDALE J. The arbitrator should have stated for what sum the verdict was to be entered. He very likely meant that it should be for 260*l.* 12*s.* 6*d.*; but that is surmise. The rule must be absolute.

Rule absolute (*a*).

(*a*) *Patteson* and *Coleridge* Js. had left the Court.

Saturday, May 7th.

The KING *against* The Lords Commissioners of the Treasury.

In re SMYTH.

A party to whom a superannuation allowance has been granted in pursuance of a Treasury minute, according to stat. 50 G. 3. c. 117., in respect of an office held during pleasure, has no vested interest in such allowance; but the minute may be revoked at will by the Lords of the Treasury.

Although such party contributed to the superannuation fund under stat. 3 G. 4. c. 113., while the clauses as to such contribution were in force.

Where a Treasury minute had been revoked under the above circumstances, this Court refused a mandamus calling on the Lords of the Treasury to restore such minute to their books, and to submit an application to parliament, in the estimates for the current year, for a grant on account of the allowance sanctioned by such minute.

THE Court having, in *Michaelmas* term last, made a rule absolute for a mandamus to the Lords Commissioners of the Treasury to issue a minute, directing payment to *W. C. Smyth* of his arrears of pension from *April* 5th 1826 to *October* 10th 1835 (*a*), a copy of the rule was served on the solicitor of the Treasury, and the Lords Commissioners paid the arrears, and continued paying the pension down to the 5th of *April* 1836. On the 9th of *April*, the assistant secretary of the Treasury wrote to Mr. *Smyth* as follows: —

"Sir,

"The Lords Commissioners of his Majesty's Treasury having had before them the minute of this Board, of 6th *October* 1826, in which their Lordships expressed their opinion that, under the circumstances therein stated, a vote should be submitted to parliament for granting to you a retired allowance of 166*l.* per annum, and having also fully considered your whole case and conduct with reference to your proceedings against the paymasters of Exchequer bills and this board, I am commanded by their Lordships to acquaint you that, being of opinion that the directions of that

(*a*) *Rex* v. *The Lords Commissioners of the Treasury*, p. 286, ante.

minute

minute should be revoked, and that no application should be submitted to parliament for a grant on this account in the estimates for the present year, their Lordships have directed those estimates to be prepared accordingly, omitting therefrom the sum heretofore included on account of that allowance.

"I am, Sir," &c.

In this term, *April* 26th, *J. Jervis* obtained a rule nisi for a mandamus to the Lords Commissioners to restore to its place in the minute book of the Treasury the minute made therein on or about the 6th day of *October* 1826, in which the then Lords of the Treasury expressed their opinion that, under the circumstances therein stated, a vote should be submitted to parliament for granting to the said *William Carmichael Smyth* a retired allowance at the rate of 166*l.* per annum, and to submit an application to parliament for a grant on this account, in the estimates for the present year.

The affidavit of *W. C. Smyth*, on which the rule was obtained, set forth the facts detailed on the former application, down to Mr. *Anson*'s last letter, with the additional matter stated above; and Mr. *Smyth* added that, as long as he enjoyed the office of Paymaster of Exchequer bills, he regularly paid a portion of his salary to the superannuation fund created by stat. 3 *G.* 4. *c.* 113.

An affidavit in opposition to the rule, by Mr. *Unwin*, clerk in the Treasury, set forth a minute of the Treasury board, of *March* 29th, 1836, in pursuance of which the letter of *April* 9th was written, and which, after referring to the minute of *October* 6th, 1826 (for recommending

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the grant of a pension to Mr. *Smyth*), proceeds as follows:—

"My Lords having fully considered the whole case and conduct of Mr. *Carmichael Smyth*, with reference to his proceedings affecting the paymasters of Exchequer bills, and this board, their Lordships are of opinion that the directions of that minute should be revoked, and that no application should be submitted to parliament for a grant on his account in the estimates for the ensuing year, about to be laid on the table of the House of Commons. My Lords have therefore to desire that the estimates may be prepared accordingly, by omitting therefrom the sum heretofore included on account of that allowance. Acquaint Mr. *Carmichael Smyth* accordingly."

It was also stated by Mr. *Wood*, an accountant in the Exchequer bill office, that all such portions of Mr. *Smyth*'s salary as had been deducted, and contributed to the superannuation fund, had, as the deponent believed, been repaid to *Smyth* on or about *February* 3d, 1825, in pursuance of stat. 5 *G.* 4. *c.* 104. *s.* 3.

Sir *John Campbell*, Attorney-General (with whom was *Wightman*), now shewed cause, and contended that the Court had no authority to issue the mandamus as prayed. And he referred to *Smyth* v. *Latham* (*a*). The Court called upon

J. Jervis and *Welsby* in support of the rule. *Smyth* v. *Latham* (*a*) decided that the plaintiff was removable at pleasure from his office of paymaster, by the Lords

(*a*) 1 *Cro. & M.* 547. 3 *Tyrwh.* 509.

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of the Treasury. But the question here is whether, after he has been so removed, and a pension has been granted him pursuant to act of parliament, the Lords of the Treasury can strike him off the pension list. [Lord *Denman* C. J. What right have we to tell any man that he shall, as a member of parliament, do such and such things?] The application is, that Mr. *Smyth*'s name may be put into the estimates. When they are presented, parliament will deal with them as it thinks proper. [*Coleridge* J. What power have we to make any one submit estimates at all?] Stat. 50 *G.* 3. *c.* 117. (*a*) restrained the discretion formerly exercised as to the allowance of pensions, by the enactments, in sect. 1., for laying before parliament the annual increase and diminution, with the grounds, and other circumstances. The exhibiting of such accounts, with respect, among other things, to the superannuation allowances, became then a statutory duty. Stat. 3 *G.* 4. *c.* 113. (*a*), which directs payments to be made out of salaries, in certain proportions, to raise a superannuation fund, recognizes a title, in the persons making such payments, to the allowances out of the fund. Sect. 1 recites the necessity of reducing some of the superannuation allowances grantable by the previous act. No statutory provision would have been requisite for that purpose, if the Lords of the Treasury had had the discretionary power now contended for. The recital speaks of persons "holding situations entitling them to have such allowances granted to them." Sect. 3 enacts that, from and after 5th *July* 1822, no superannuation allowance shall be granted unless by the King in council, or the Treasury; and, by sect. 4., no such grant is to be made except under certain con-

(*a*) See stat. 4 & 5 *W.* 4. *c.* 24.

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ditions as to age, certificate of infirmity and services, or service performed to the satisfaction of the Lords of the Admiralty or Treasury, to be testified by their minute. Discretion being thus taken away as to granting allowances, it cannot be supposed to continue as to withholding them. Sect. 6 requires an account to be made up to every 5th of *January*, and laid before parliament, of the total amount of superannuation allowances payable on the 5th of *January* preceding, the names of persons receiving such allowance who have died during the year, and the amount of allowance payable to every such person, and the name of every person to whom a superannuation allowance has been granted during the year, and the annual amount of such allowance. Sections 9 to 12, which provide for contributions to the superannuation fund, and for making certain stated deductions for the fund from all salaries in respect of which superannuation allowances may be granted, shew that the legislature contemplated a vested right in the allowances. Where it is intended to give a discretionary power, that power is given in express words, as in the latter clause of sect. 14. It is true that, by stat. 5 G. 4. *c.* 104., the enactments of 3 G. 4. *c.* 113., as to deductions and contributions for a superannuation fund, are repealed, and it is ordered that the contributions already made shall be repaid; but that does not take away the vested right which the contributors had acquired in their allowances. The party now applying has, therefore, a legal right; and he has no remedy but by the present course. Unless his name be in some manner inserted in the estimates, his case cannot be considered by parliament. It is the duty of the commissioners to make the minute; it is, incidentally, their duty to lay the name of the party before parliament, though they may not be compellable

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compellable to add any statement of reasons. The grounds (as far as they appear) for the proceeding taken by the Treasury are in part such as the Court has already deemed insufficient for withholding the pension. [*Patteson* J. We decided nothing in the former case respecting the title to this pension. We held only that the party was entitled to have a sum of money which the Lords Commissioners had admitted to be in their hands for his use.]

Sir *John Campbell*, Attorney-General, contended, in answer, that the statutes referred to were all in restraint of the power of the Crown to grant pensions; and the pensions granted by the Crown, before those statutes, were during pleasure, not for life. He also referred to *Gidley* v. *Lord Palmerston* (*a*).

Lord DENMAN C. J. (stopping Sir *J. Campbell*). There is not the smallest foundation for this motion. The party applying should have shewn some words, in one of the statutes, requiring the Lords of the Treasury to do the particular acts insisted upon. But he has failed to point out any such words. It does not appear that the grant which it was resolved, by the minute of 1826, to lay before parliament, was not altogether a grant during pleasure, and revocable the day after. If so, it would be absurd to require that the board should recal that act of revocation in which they had exercised the discretion that belonged to them. The first branch of the rule before us is, that the Lords Commissioners should be called upon to restore to the minute book of the Treasury the minute of *October* 6th, 1826, expressing their opinion

(*a*) 3 *B.* & *B.* 275.

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that a vote should be submitted to parliament for granting Mr. *Smyth* a retired allowance. For this no ground is laid. If the Lords Commissioners had an option then to decide whether or not a vote on this subject should be placed before parliament, it is equally in their discretion now to say that, under present circumstances, no such vote shall be submitted. I do not say whether the Court has any power to issue a mandamus for the purpose of interfering with the books of the Treasury. Here, at any rate, it has not. The second branch of the rule is for calling on the Lords Commissioners to submit an application to parliament for a grant on account of this pension, in the estimates for the present year. What power we have to call upon them to submit a vote to parliament, I cannot see. I can draw no such inference in favour of the vested right which has been insisted upon, from the language of stat. 3 *G.* 4. *c.* 113. The superannuation allowance seems to me to be held on the same tenure as the office itself, namely, during pleasure. I cannot discover in the sixth section any ground for requiring this vote to be submitted. It enacts that the total amount of superannuation allowances shall be annually laid before parliament; but that does not affect the question, what the amount shall be? It is not even required that the names of those entitled to allowances shall be annually submitted. The names of which the insertion is required are those of the persons, receiving allowances, who have died, and the persons to whom allowances have been granted, during the year. At all events this does not vary the tenure on which the allowance is held. We cannot say, because a person's name was once held fit to be submitted to parliament for an allowance, that such allowance shall be submitted in the estimates now.

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These reasons render it unnecessary to enter into more general considerations, which also might possibly furnish an answer to the present application.

LITTLEDALE J. I am of opinion that there was no vested right in this case, and that the minute of 1826 left the Lords Commissioners at liberty, in a future year, to retain or to strike out the name of the party. And, even if they were compellable to restore the minute, that would not accomplish the object contemplated, unless the party's name were submitted to parliament, which must be done, if at all, under stat. 3 *G.* 4. *c.* 113. *s.* 6. But that section would not compel the Lords Commissioners to mention this party's name, even if the minute were restored. We have no authority to require that they shall submit the proposition suggested.

PATTESON J. The application is extraordinary; and the party has failed to lay any foundation for it. No clause of any act has been cited, to shew that an allowance of this kind, once granted, is to continue for life. It is held by the same tenure as the office itself was, namely, during pleasure. And, if the minute conferring the pension did not give a vested interest, none could be acquired by contributing to the superannuation fund. As to the latter part of the motion, there is nothing to shew that the Lords Commissioners have not done all that is required of them by stat. 3 *G.* 4. *c.* 113. *s.* 6.; and there is no pretence for calling upon them to make the proposed application to parliament (*a*).

Rule discharged (*b*).

(*a*) *Coleridge* J. had left the Court. (*b*) See the next two cases.

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In re HAND, Gent., One, &c.

Under stats. 50 G. 3. c. 117. and 3 G. 4. c. 113., the Lords of the Treasury were not authorised to grant retired allowances for life. A grant of such allowance made by them in general terms was subject to the discretion of parliament in voting the supplies from year to year, and was revocable by the Lords of Treasury.

And, where the Lords, after granting such allowance on the abolition of an office, had revoked the grant, but the allowance had been erroneously inserted in the estimates of the year, voted by parliament, and included in an appropriation act, this Court refused to enquire into the propriety of the revocation, and would not grant a mandamus to the Lords for payment of the arrears, it being proved that the sum so voted had never come to their hands, and had been newly appropriated by a later act of parliament.

A RULE nisi was obtained in this term for a mandamus, calling upon the Lords Commissioners of the Treasury to issue a Treasury minute or authority to the Lords Commissioners of the Admiralty, the treasurer of the navy, or other proper officer, directing and authorising him or them to pay, or cause to be paid, to *Robert Hand* the arrears of his pension or retired allowance of 240*l.* per annum, from the 25th of *December* 1832, to the 25th of *March* 1836, as granted to him by the Lords Commissioners of the Admiralty.

By Mr. *Hand*'s affidavit, it appeared that the office of sealer to the great seal was granted to him, subject to an existing life estate, by the Lord Chancellor, in 1801, and confirmed to him by patent, to be exercised by himself or by deputy, for his life; and that he entered upon the office, and into the receipt of the fees and emoluments, in 1810. In 1805, before the date of the patent, he was appointed clerk in the navy pay-office, an employment which required his constant attendance. The affidavit then mentioned the passing of stat. 3 G. 4. *c.* 113., "to amend an act passed in the fiftieth year of his late Majesty, for directing that accounts of increase and diminution of public salaries, pensions and allowances should be annually laid before

parliament,

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parliament, and for regulating and controlling the granting and paying such salaries, pensions and allowances;" and it set out sect. 1. of the act, regulating the future amount of superannuation allowances, and several other sections (sects. 2 to 7, and sects. 10, 12, and 15), fixing the amount, &c., of such allowances, and establishing a fund for paying them, by contributions and deductions from salaries. The Navy Pay Office was one of the departments included (by schedule) in these provisions. The affidavit also referred to sects. 1 and 3 of stat. 5 *G.* 4. *c.* 104., which repealed the former enactments as to contribution from salaries, and directed that all contributions and deductions made under the previous act should be refunded. None, however, had been made from *Hand*'s salary. In *August* 1832, the Lords of the Admiralty, having determined on placing several clerks of the Navy Pay Office, and among them Mr. *Hand*, on superannuation allowances, gave him notice that, in consequence of the consolidation of the civil departments of the navy, and the abolition of his office, his services were no longer required, and they had granted him "a pension of 240*l.* per annum." *Hand* ceased to be a clerk from the date of the notice. His full salary, till that time, was 400*l.* a year. In the navy estimates, laid before parliament the next year, (ordered to be printed, *February* 1833), the pension granted to *Hand* was inserted under the head "Civil Pensions and Allowances," among "Pensions granted on Reduction of Office." It was stated as follows:—

	Served Years.	Pension.
"*Robert Hand*, clerk	27	£240."

By an appropriation act, 3 & 4 *W.* 4. *c.* 96., passed *August* 29th, 1833, it was enacted, in sect. 10., (which, with

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with others of the same act, was referred to in the affidavit), that out of the supplies granted to his Majesty in the then session of parliament there should be issued and applied any sum or sums of money, not exceeding 220,342*l.*, to defray the charge of civil pensions and allowances which should come in course of payment during the year ending *March* 31st, 1834. And, by sect. 20., that the supplies provided (as in the act before mentioned), "shall not be issued and applied to any use, intent, or purpose whatsoever other than the uses, intents, and purposes before mentioned, or for the other payments directed to be satisfied thereout by any act or acts, or any particular clause or clauses for that purpose contained in any other act or acts of this session of parliament." *Hand* received the pension from the time of his retiring from the Navy Pay Office till the discontinuance of the pension as after stated.

By stat. 1 & 2 *W.* 4. *c.* 56. ("to establish a Court in Bankruptcy"), the Lords of the Treasury were enabled (sect. 53) to grant compensation to certain officers of the Lord Chancellor and of the Court of Chancery, whose fees would be abolished by the operation of the act. The office of sealer to the great seal, which *Hand* held then and at the time of the present application, was among those included in this enactment; and, in pursuance of it, the Lords of the Treasury, by a minute of *January* 24th, 1833, awarded to *Hand* 449*l.* per annum so long as he should continue in office, the said annuity or compensation to commence from *January* 11th, 1832.

In *March* 1833, *Hand* received a letter, addressed to him by direction of the Lords of the Treasury, wherein, after noticing the last-mentioned grant, they stated that, adverting to the fact of his holding the said office of sealer,

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sealer, amounting in emolument to 700*l.* per annum, they had thought proper to direct the Lords of the Admiralty to discontinue the annual payment of 240*l.* per annum made to him from the Navy Pay Office. From the date of that letter, *Hand* received no further payment on account of the last-mentioned annuity; and he now stated that he was informed, and believed, "that from time to time sufficient sums of money have been voted by parliament to, and received by, government, to be appropriated for the payment of civil pensions granted by the authority of the government, out of which they could provide for and pay to him, this deponent, the arrears" of the last-mentioned annuity, "without prejudice to the other demands on the public service." And that the pension of 449*l.* was granted for life without qualification, and solely as a compensation for the fees of which *Hand* was deprived by the establishment of the Court of Review.

On the 2d of *December* 1835, *Hand* presented a memorial to the Lords of the Treasury, praying that they would reconsider his claim, and order the arrears of his pension to be paid, and the payments continued for the future, or that they would refer the case to the law officers of the Crown. The answer was, that it did not rest with the Treasury Board to direct compliance with the prayer of the memorial for payment of the pension. *Hand* afterwards presented a memorial to the Lords of the Admiralty, stating the above facts, and ending with a similar prayer to the above. The answer was, that the Lords of the Admiralty did not admit the claim, and had no funds in their possession which they could legally apply to meet it.

In opposition to the rule, Mr. *Briggs*, accountant-general

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general of the navy, deposed that it was part of his duty to prepare, for the purpose of being laid before parliament, the estimates of monies required for the service of the naval department of the kingdom for each financial year, which is computed from *March* 31st: that in such estimates the amount of the sums voted in the estimates of the preceding year for superannuations and pensions is stated under their respective heads, and abatements made therefrom to the amount of such like allowances as, during the preceding year, have ceased to be payable, by death or otherwise: that in the account annually laid before parliament, as required by stat. 2 *W.* 4. *c.* 40., relating to the civil departments of the navy (s. 30.), the balance is stated between the sum appropriated to each head of service for the preceding year, and the sum expended under such head of service, which balance is afterwards reported to the Lords of the Treasury, in order that it may be made available as part of the ways and means of the ensuing financial year: that the deponent was, by an order of the Lords of the Admiralty, dated *August* 2d, 1832, directed to pay *Hand* the pension of 240*l.*; and that, by an order from them of *February* 1st, 1833, he was directed to cease paying it, and it was accordingly discontinued: that the estimates are prepared in *January* of each year, and that the account therein contained, of the amount of pensions which have ceased, is made up to the 31st of *December* preceding; and that consequently, notwithstanding the last-mentioned order, the amount of *Hand*'s pension of 240*l.* was reckoned in the estimates for the financial year beginning *April* 1st, 1833, and was included in the vote of parliament for that year; but that the pension has not been included in any subsequent

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sequent estimate, nor any money voted or appropriated by parliament to answer it: and that, although sufficient money was appropriated for the payment of such pension from *March* 31st, 1833, to *March* 31st, 1834, yet the amount, being unpaid, formed part of the sum of 168,579*l.* which was placed at the disposal of the Lords of the Treasury in *February* 1835, and became no longer available to or disposable by the Lords of the Admiralty. It was further sworn by one of the chief clerks of the Treasury, that, in *February* 1835, the Lords of the Admiralty made their report to the Lords of the Treasury, recommending that 168,579*l.*, the savings of the grant for navy services of the year ended *March* 31st, 1834 (mentioned in *Briggs*'s affidavit), should be appropriated as ways and means for the general public service: that, by direction of the Lords of the Treasury, in an account laid before parliament, *March* 21st, 1835, to shew the amount of ways and means of former years which might be considered as savings, the last-mentioned sum was included under the head of grants for former years which it was supposed would not be required; and the sum was, with other monies, appropriated, by an act of that session of parliament, as part of the ways and means applicable to the public service of the year ending *March* 31st, 1836.

Sir *John Campbell*, Attorney-General, and *Wightman*, now shewed cause. Supposing that the Lords of the Treasury are bound to account for the exercise of their discretion in this case, the affidavits fully justify it. The present application seems founded on the decision in Mr. *Smyth*'s case (*a*) in last *Michaelmas* term, which

(*a*) *Rex* v. *The Lords of the Treasury*, antè, p. 286.

might,

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might, if it were necessary now to question it, require the reconsideration of the Court. Steps would have been taken for bringing it before a court of error, if it had been thought advisable under the circumstances to contest the mandamus. Nothing which had passed gave *Smyth* any legal title to the allowance there claimed. The vote of parliament was not a grant to him, but to the King, to enable him to pay such allowances; and, if the effect of the vote was merely this, appropriation acts, and more especially acts in which *Smyth* was not even named, could not give him any greater legal right. The grant was only a promise, not binding legally, nor even morally, unless all conditions of the grant were fulfilled by the party receiving it. The ground on which the Court proceeded was, that the Lords of the Treasury had told *Smyth* that he might receive his arrears from them. But that could give no legal right if none existed before; and without such right the party could not be entitled to a mandamus. It was held in *Gidley* v. *Lord Palmerston* (*a*) that the Secretary at War was not liable to an action for arrears of a retired allowance granted to a clerk in the War-office, though such arrears had been inserted in the estimates voted by parliament, and the money placed at the disposal of the Secretary. *Dallas* C. J. said there, "The money received is granted by the Crown, subject only to the disposition or control of the Defendant, as the agent or officer of the Crown, and responsible to the Crown for the due execution of the trust or duty so committed. There is, therefore, no duty from which the law can imply a promise to pay to the testator during his life,

(*a*) 3 *B. & B.* 275.

or

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or to his executor after his death, nor can money be said to have been had and received to the use of the testator, which money belonged to the Crown, being received as the money of the Crown, and the party receiving it being responsible only to the Crown in his public character." The fallacy urged there, on behalf of the plaintiff (and which will be relied upon here) was, that the pension granted by parliament was a grant to the individual. If there were such a vested interest in allowances of this kind as will be alleged on the other side, the half-pay of an officer would be assignable, though the contrary has been held in *Flarty* v. *Odlum* (*a*) and *Lidderdale* v. *The Duke of Montrose* (*b*). There can be no doubt that, before stat. 50 G. 3. *c.* 117., the grant of a superannuation allowance would have been a grant during pleasure. That statute did not make it a grant for life. The tendency of the clauses was to restrain the power of the Crown in making such allowances. The same observation applies to stat. 3 G. 4. *c.* 113.; and it was held, in the case just now decided (*c*), that that statute did not give a vested interest in the allowance. No argument can be drawn from sects. 9, 10, which were repealed by stat. 5 G. 4. *c.* 104. Supposing the former decision, in favour of Mr. *Smyth* (*d*), to be maintainable, it differs entirely from the present, because there the money claimed was in the hands of the Lords of the Treasury, and they sought, before paying it, to impose a condition which the Court thought improper. Here there are no funds. As to the year's pension actually voted by parliament, if a right to it did at any

(*a*) 3 *T. R.* 681. (*b*) 4 *T. R.* 248.

(*c*) *Rex* v. *The Lords of the Treasury, Ex parte Smyth*, antè, p. 976.

(*d*) *Rex* v. *The Lords of the Treasury*, antè, p. 286.

time

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time exist, it was taken away by the appropriation act 5 & 6. *W.* 4. *c.* 80., which made it a part of the ways and means for the year ending in 1836. Stat. 4. and 5 *W.* 4. *c.* 24. repeals stat. 3 *G* 4. *c.* 113., but is similar in many of its provisions; and in sect. 22. it recognises the power of government to make a diminution in the number and amount of retired allowances.

Sir *W. W. Follett* and *J. Jervis*, contrà. The clerkship to which Mr. *Hand* had been appointed in the Navy Pay Office was abolished when he had served twenty-seven years, and was willing to continue his service. He was then entitled, under the acts regulating pensions, to the retired allowance which was granted him. He held also a grant for life of the office of sealer to the great seal; that was among certain offices which were subjected to loss of fees, for which loss the legislature, by stat. 1 & 2 *W.* 4. *c.* 56., directed compensation to be made; and, the profits being ascertained, a compensation was granted accordingly. This grant affords no ground in justice for taking away the other. The compensation to Mr. *Hand*, as sealer, was in respect of emoluments which he derived, not from the Crown, but from suitors. Then, as to the right of this Court to interfere. The pension of 240*l.* was granted by a Treasury warrant, pursuant to statutes 50 *G.* 3. *c.* 117. and 3 *G.* 4. *c.* 113. Before those acts, the King might have charged his revenue with a pension for life. There is nothing in the acts to shew that a pension granted, as this was, in general terms, was revocable, more than it formerly would have been. It is said that the office was held at pleasure, and that therefore so is the pension; but there is nothing to support this latter position. At least, if the

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the pension be at pleasure, it is not at the pleasure of the Lords of the Treasury. By stat. 3 *G.* 4. *c.* 113. the Lords of the Treasury are empowered to fix the amount of allowance to be granted, in the first instance: that is the extent to which they may exercise a discretion. By *s.* 6 of that act, an account is to be made up to the 5th of *January* in each year, "specifying the total amount of superannuation allowances payable under the provisions of this act in each department, on the 5th day of *January* in the preceding year, the name of every person receiving such allowance who may have died in the course of the year, together with the annual amount of the allowance which was payable to such person, and also the name of every person to whom a superannuation allowance may have been granted in the course of the year, and the annual amount of such allowance; and such account shall be laid before parliament on or before the 25th day of *March* in each year," &c. Thus the name of the person, to whom an allowance has been granted, is to be laid before parliament when the grant takes place, but not again till his death; and a direction is given for informing parliament of pensions ceasing by death, but not of pensions discontinued. It is, therefore, contemplated that the allowance, once granted, shall continue during the party's life. There is no reason for supposing that pensions, which are compensations for past services, were meant to be discretionary. As to the particular claim in this case, two questions arise. First, as to the sum actually voted and appropriated in 1833. That was a grant made by parliament for an express purpose, and by sect. 20 of the appropriation act of that year it is enacted that the supplies thereby granted

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shall not be applied to any purpose other than those mentioned in the act, or in any other act of that session. That takes away any discretionary power that might be supposed to exist under stat. 3 *G.* 4. *c.* 113., of diminishing the allowance. Secondly, as to the amount claimed for the subsequent years, it is said that no money was voted for *Hand*'s pension during those years; but that cannot be ascertained from the estimates. *Hand*'s name would not appear in them, at all events, after the first year; but his pension ought to have been included; and it must be presumed, unless the contrary appear, that those who made up the estimates did their duty in this respect(*a*). Could the Lords of the Treasury say, in the case of one of the great officers of state, as for instance a Lord Chancellor, that they had, in their discretion, withdrawn his retiring pension, and appropriated it to the public service in other ways? [*Patteson* J. In the case of the Lord-Chancellor they have no discretion as to granting the pension.] The observation would apply to other officers. Supposing, then, that the Lords of the Treasury have money under their control, out of which this pension ought to be paid, *Gidley* v. *Lord Palmerston* (*b*) is no authority against this application. The question there was, whether a contract could be presumed; here the question is, whether the Court will interfere by mandamus when public officers have money in their hands for a certain specific purpose, and refuse to pay it over. This involves the principle of the decision already come to on Mr. *Smyth*'s first application against the Lords of the Treasury. In

(*a*) There was much discussion on this part of the case, and the Court inspected the volume of estimates for 1834–5, which was brought from the House of Commons; but they ultimately remained satisfied with the statement furnished by the affidavits in opposition to the rule.

(*b*) 3 *B.* & *B.* 275.

Ellis

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Ellis v. *Earl Grey* (*a*) the Vice-Chancellor, on the application of parties interested, granted an injunction to restrain the Lords of the Treasury from paying compensation money awarded in respect of an office; and their character as public officers was held no bar to the application; the Vice-Chancellor being of opinion that the Lords of the Treasury were merely "conduit pipes" for payment of the sum to the parties entitled, and were in the same situation with the Governor and Company of the Bank of *England*, who are frequently prevented by a Court of Equity from transferring stock or paying dividends. *Rankin* v. *Huskisson* (*b*) was there cited as an example of a similar interference, by injunction against the Commissioners of woods and forests. In *Priddy* v. *Rose* (*c*), referred to in *Ellis* v. *Earl Grey* (*a*), the principle now contended for was recognised by the Master of the Rolls. Half pay is not assignable; but that is because it differs from a pension for past services, being in the nature of a retaining fee for services which may be still required. There is little doubt that cases might be found in which pensions have been held assignable. In *Ex parte Battine* (*d*) it was decided that a pension enjoyed by an insolvent might be appropriated to the payment of his creditors. [Lord *Denman* C. J. That was under an express enactment.] In the case of the Marquis and Marchioness of *Westmeath* the amount of a pension was considered in calculating alimony (*e*).

Lord DENMAN C. J. I think that the case which we decided in last *Michaelmas* term does not apply here.

(*a*) 6 *Sim.* 214. (*b*) 4 *Sim.* 222.
(*c*) 3 *Mer.* 86. (*d*) 4 *B.* & *Ad.* 690.
(*e*) See, as to assignment of pensions and half pay, the cases cited in *Priddy* v. *Rose*, 3 *Mer.* 86. Also *Stone* v. *Lidderdale*, 2 *Anstr.* 533.

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In that case the Lords of the Treasury had stated, from year to year, that they had received money on account of Mr. *Smyth's* pension, and that it was lying by them for his use. When he applied for it he was told that it could not be paid, unless upon conditions, which they had no right to impose if they merely held the money for the use of a party to whom it had been voted. All that the Court said there was, that the Lords of the Treasury must make a return, and shew why the money was not paid over. No decision was given on the point of law. If any thing in the ruling of the Court was wrong, it might have been called in question afterwards. If the case in the Common Pleas, which has been referred to, was in Mr. *Smyth's* favour, we should have been glad to have our attention called to it on a return to the mandamus. I will only say further, as to the former case here, that the statement laid before us was such as made it imperative on the Lords of the Treasury to explain their refusal. In the present case we are driven to enquire whether the Lords of the Treasury had power to make a grant for life of the pension claimed. It appears to me that they could not; and therefore the foundation of the claim fails. The office was abolished by a competent authority. The compensation was not made by way of bargain. The abolition was complete; and it was for the Lords of the Treasury to give an equitable compensation. It appears that they made a warrant for that purpose; and, if they had power to grant a pension for life, there might be ground for the position that they had done so; but I do not find any thing in the acts of parliament to give them such a power. Mr. *Hand* was told, in *August* 1832, that he would receive a pension in lieu of the emoluments of the office he then held; that is, that the amount of such

pension

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The King against Lords of Treasury. In re Hanni.

pension would be included in the estimates laid before parliament in the following year. That was done; but early in 1833 it was revoked. We have no right to enquire whether there was reasonable ground for such a proceeding. He was in fact told that it would take place. The grant to him of 240*l.* was indeed included in the estimates for 1833–4, and voted by parliament; but I think it has been satisfactorily explained that that was a mistake, that the sum did not enter into account as paid, and that the 240*l.* was altogether excluded from the estimates of the following year. And then it appears that an unappropriated amount, of which this formed part, was subsequently disposed of as part of the ways and means. There being no power to grant this pension for life, the vote of parliament did not bind the Treasury to continue it, but only gave power to the Crown to do so: and the sum has now been voted to another purpose.

LITTLEDALE J. The Lords of the Treasury had no funds for this pension but such as might be voted by parliament; they could only authorise a party to receive an allowance for life if such vote should pass, and so long as parliament should continue such vote. As a pension, they had no power to grant it, nor funds to charge it upon. After they had made this grant, they for some reason thought proper to revoke it. The estimates were by that time made up; and, in consequence, this sum was included in the parliamentary grant for the year. But it is explained that the amount was afterwards thrown into the general fund applicable to other services, and never reached the Lords of the Treasury for the purpose in question. Under these circumstances we cannot grant a mandamus.

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PATTESON J. I am of the same opinion. I do not think we ought to enquire whether the Lords of the Treasury were right or not in revoking the warrant for this pension. There is nothing in the acts of parliament enabling them to grant a pension specifically for life. It is contended that a mere grant would operate to that extent by implication. Perhaps the legislature contemplated that the allowances, when granted, would so continue; but there is no enactment to that effect. The employment which this party had, as a clerk in the Navy Pay Office, was scarcely an office at all; but, at any rate, we cannot say that, because a pension was granted in respect of it, that pension was for life. The pension was paid prospectively from *August* 1832, and had been revoked before it was voted by parliament. Even if the Lords of the Treasury had power to grant a pension for life, there was nothing in the circumstances of this grant to render it irrevocable. The appearance of Mr. *Hand*'s name in the estimates for 1833–4, and the want of any statement on the subject in the later estimates, have been explained. And, if he was not entitled to claim this allowance for the year in which it was voted, à fortiori he cannot claim it for a subsequent year (*a*).

Rule discharged (*b*).

(*a*) *Coleridge* J. had left the Court.

(*b*) See the next case.

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Ex parte SARAH EASTER RICKETTS, Administratrix of BEVAN.

Monday, May 9th.

Deductions having been made from a naval officer's half-pay in pursuance of a general order from the Admiralty, application was made on his behalf to have the amount of such deductions restored, and the Lords of the Admiralty stated, in answer, that they had given directions for restoring it. Afterwards they retracted this consent, giving as a reason that it would subject them to many similar applications. After the officer's death, his administratrix moved for a mandamus to the Lords of the Admiralty to restore the deducted sums, on the ground that they had admitted the right to them and the possession of applicable funds.

Held, that there was no vested right in the half-pay, entitling the administratrix to a mandamus.

JERVIS in this term (*April* 16th) moved (*a*) for a rule to shew cause why a mandamus should not issue calling on the Lords of the Admiralty to make an order for the payment of 394*l.* arrears of half-pay of Lieutenant *Bevan* deceased, to his administratrix *Sarah Easter Ricketts*. It appeared by affidavit that, from 1818 to 1831, Lieutenant *Bevan* was on half-pay, and, having become lunatic, was maintained, under the direction of government, in *Haslar* Hospital. From 1819 to 1831, a moiety of his half-pay was deducted, pursuant to an order from the Admiralty with reference to such cases. Applications were made by his relatives to have it restored, but without success. In *June* 1831 the regulation established by the above order was discontinued, and the abatement on the half-pay reduced to 1*s.* 6*d.* per day. Lieutenant *Bevan* died in *August* 1831. Mrs. *Ricketts* afterwards applied to the Lords of the Admiralty for a re-payment of the moiety of half-pay withheld from 1819 to 1831. This was at first refused; but, in answer to a subsequent application, the Secretary to the Admiralty wrote to Mrs. *Ricketts*'s agent a letter, dated *January* 11th 1832,

(*a*) Before Lord *Denman* C. J., *Patteson*, and *Coleridge* Js.

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as follows:—"Sir,—My Lords Commissioners of the Admiralty, having had under their further consideration the circumstances attending the late Lieutenant *Bevan's* case, command me to acquaint you that they have given directions to restore to his legal representatives the sum which may have been deducted from his half-pay since his first admission into the lunatic asylum at *Haslar*, over and above the abatement of 1*s.* 6*d.* a day which is now charged against the half-pay of officers received into the lunatic asylum. I am, &c." Shortly afterwards, however, the agent received another letter dated *January* 20th, 1832, from the Secretary, in which he referred to his former letter as stating that the Lords of the Admiralty "had directed the Victualling Board to repay to the representatives of the late Lieutenant *Bevan* the amount of half-pay retained for his maintenance in the lunatic asylum at *Haslar*;" and he added that in consequence of a representation from the Victualling Board that the admission of this claim would bring forward ninety other claimants, the Lords of the Admiralty, though disposed, out of compassion, to make the payment, did not feel authorised, in such a case, to deviate from the established regulations. Mrs. *Ricketts* stated in her affidavit that she had received, through her agent, among other payments on Lieutenant *Bevan's* account, one, about *July* 1831, and another about *July* 1832, which, as she was informed and believed, were in part satisfaction of the moiety of half-pay withheld as above mentioned (*a*). No other payment appeared to have been made on this account. *J. Jervis* contended that the affidavits shewed an admission on behalf of the

(*a*) No further explanation was given as to these payments; nor were they relied upon in the argument of counsel.

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Lords of the Admiralty that they had the money claimed, and were bound to pay it; and he urged that an officer's claim to his half-pay was a legal right, on which a mandamus might be grounded. [*Coleridge* J. Can it be said that there is a legal right in half-pay? In *Flarty* v. *Odlum* (*a*) it is called a voluntary donation.] While the officer is on the half-pay list, there is a contract between him and government. If not, whence does government derive its right to call upon him for his services? [Lord *Denman* C. J. It does not appear to me at present that there is any legal claim; but, before we decide upon the application, we will take time to ascertain what ground the right can be rested upon.]

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. At the time when this motion was made, we thought that there was no primâ facie case, but considered it best to look further into the statutes. Mr. *Jervis* did full justice to his clients in presenting it to us; but we are of opinion that there is no pretence for saying that the half-pay was so vested as to entitle an administrator to call upon a public board to pay it over. There will therefore be no rule.

Rule refused (*b*).

(*a*) 3 *T. R.* 681. See page 995. note (*e*), antè.

(*b*) See the two preceding cases, and *Rex* v. *The Lords Commissioners of the Treasury*, page 286, antè.

Monday, May 9th.

BLEWETT *against* TREGONNING.

Under the Rules *Hil.* 4. *W.* 4. (*General Rules and Regulations*, 3), where plaintiff has obtained a verdict, but defendant has obtained a rule nisi for a new trial, which after the lapse of a year has been discharged, and in the meantime defendant has died, the Court will order judgment to be entered nunc pro tunc, though more than two terms have elapsed since the discharge of the rule, if it appear that the delay was occasioned by taxation of costs, and no fault be specifically imputed to the plaintiff.

THIS cause was tried at the Spring assizes for *Cornwall*, 1834. Of the issues, which were ten, nine were found for the plaintiff and one for the defendant; and in the ensuing term the plaintiff obtained a rule nisi for judgment, non obstante veredicto, on the last issue; and the defendant obtained a rule nisi for a new trial, in case the plaintiff's rule should be made absolute. In *March* 1835 the defendant died. In *Trinity* term 1835 cause was shewn; the plaintiff's rule was made absolute, and the defendant's rule discharged (*a*). The plaintiff taxed his costs (which amounted to 356*l.*), and the taxation was attended by a clerk of the defendant's agent. In this term a rule was obtained, calling on the personal representatives of the defendant to shew cause why the plaintiff should not be at liberty to enter up judgment on the several issues, with 1*s.* damages, as of *Easter* term 1834. It did not appear by any particular statement that the plaintiff had been dilatory in prosecuting the taxation, or in applying for this rule.

Butt now shewed cause. The application is made too late. By the *General Rules and Regulations, Hil.* 4 *W.* 4. 3. (*b*), all judgments are to be entered of record of the day when signed, and shall not have relation to any other day. It is, indeed, provided, "that it shall be competent for the Court or a Judge to order a judgment to be entered nunc pro tunc;" but it is important

(*a*) *Blewett* v. *Tregonning*, 3 *A.* & *E.* 554. (*b*) 5 *B.* & *Ad.* ii.

that

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BLEWETT against TARGONINE.

that the Court should lay down some rule for the application of that proviso. Before the new rules, a reasonable limit was given to the liberty of entering judgment, where a party died after verdict, by stat. 17 *C.* 2. *c.* 8. *s.* 1., which enacted that the death should not be alleged for error if the judgment were entered within two terms after the verdict. Here, the judgment ought to have been entered within two terms after the decision upon the cross rules. An application which affects the disposal of assets ought not to be made at this distance of time. No reason is given for the delay which has taken place; but a party wishing to avail himself of the proviso in the new rule, ought to shew facts that may bring him within it. If he does not, the analogy to stat. 17 *C.* 2. *c.* 8. should prevail. [The Court conferred with the Master as to the circumstances of the taxation.]

Sir *W. W. Follett*, contrà. The plaintiff was entitled to judgment, but could not have it while the defendant's motion was depending, which motion proved unfounded. When the case was ultimately decided, he was entitled to stand in the same situation as when the verdict was given; but he could not make this application till the costs were taxed.

Per Curiam (*a*),

Rule absolute.

(*a*) Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

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Monday, May 9th.

CAHILL *against* MACDONALD and Others.

If a defendant obtains an order calling on plaintiff to give security for costs, and directing that defendant shall have seven days to plead after such security given, and defendant afterwards, and before security given, craves oyer, the time for pleading runs from the day when oyer is granted, if subsequent to the giving of security or rescinding of the order, and not, in that case, from the time when such security is given or order rescinded.

THIS was an action, commenced in *February* 1835, on a life insurance policy. The plaintiff resided in *Ireland*. A declaration having been delivered, it was directed by order of a Judge, dated *April* 13th 1835, that the defendants should have seven days to plead after security for costs given, upon the usual terms. On the 16th of *April* 1835, it was ordered by a Judge that the defendants should have oyer and a copy of the policy, without prejudice to their application for security for costs. An order for giving security for costs was made afterwards, and rescinded *April* 9th, 1836. Oyer of the policy was given, *April* 11th, 1836. On the 18th of *April* judgment by default was signed, the defendants not having pleaded. On the 20th of *April* a rule of this Court was obtained, to shew cause why the judgment should not be set aside for irregularity, as having been signed too soon.

Sir *W. W. Follett* now shewed cause. By the order of *April* 13th, 1835, the time allowed for pleading was seven days after security for costs should be given. The time for pleading expired on the 16th of *April* 1836, seven days after the order for giving security for costs was rescinded. [*Littledale* J. Where a defendant craves oyer, the rule is, that he has as many days to plead after oyer granted as he had when he demanded it]. The rule does not apply here, by reason of the previous order. And the affidavits shew (*a*) that, before

(*a*) He referred here to statements which it has not been thought necessary to detail.

oyer

oyer granted, the defendants had all the information necessary to enable them to plead.

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CAMILL *against* MACDONALD.

Sir *J. Campbell*, Attorney-General, contrà. The defendants had, by the rules of practice, seven days for pleading after oyer granted, because they had that time, at least, for pleading, when they demanded oyer. It would have been the same if security for costs had been given. The time expired on the 18th, not sooner.

Per Curiam (*a*),

Rule absolute.

(*a*) Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

Ex parte BINNS.

Monday, May 9th.

R. V. RICHARDS moved that Mr. *Charles Binns* might be re-admitted an attorney of this Court without paying arrears of certificate duty. He was admitted in 1818, and practised, with a certificate, till 1829. He then (by reason of the state of his affairs) ceased renewing his certificate, after which he occasionally practised in one court (but no other), viz. "the Court for the Hundred of the *High Peak*, in the county of *Derby*, for the recovery of debts under 5*l*." His affidavit stated that "the practice of this Court is regulated in its various processes according to the principles and practice of the Court of King's Bench: that the attornies of the Hundred Court are also advocates for the suitors, and are regulated in their pleadings and observe the same rules as are observed by advocates and

Where an attorney had ceased taking out his certificate, and practised in a Hundred Court (the practice of which was regulated according to that in K. B.) for the recovery of debts under 5*l.*, and not elsewhere, the Court would not allow him to be re-admitted without paying his full arrears of certificate duty.

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Ex parte Binns.

and counsel at the bar of the superior courts." Mr. *Binns* further stated, that he continued to practise in the Hundred Court after ceasing to take out his certificate, in ignorance that such practice would be construed to come within the purview of the acts requiring a certificate; that he had so done, contemplating re-admission, and wishing to keep up his knowledge, but not with a view to profit; and that he had ceased as soon as he found that the practice would endanger his re-admission.

Lord DENMAN C. J. I fear we have no choice. He must pay all the arrears of duty for the time during which he has practised without a certificate.

LITTLEDALE, PATTESON, and COLERIDGE Js. concurred.

To be re-admitted on payment of the arrears of duty, and twenty shillings fine (*a*).

(*a*) See *Ex parte Thomson*, 5 *Dowl. P. C.* 275.

Monday, May 9th.

Ex parte MILLER.

An attorney who had practised regularly under a certificate, in this Court and the Court of Common Pleas at *Lancaster*, and had subsequently discontinued practice, and been employed as superintendent of collieries, and had afterwards been re-admitted an attorney in the Court of Common Pleas at *Lancaster*, all previously to R. *Hil.* 6 *W.* 4., 6., was, after that rule, readmitted an attorney of this Court, without the affidavit required by the rule.

JOSEPH ADDISON moved for the readmission of an attorney upon an affidavit that he was admitted in the Court of Common Pleas at *Lancaster*, and in this Court in 1829, and had practised in both under a certificate, regularly taken out, till *December* 1831, when he ceased to practise, and became a superintendent of

collieries,

collieries, in which employment he continued until the latter end of 1834, and that he was then re-admitted an attorney in the Court of Common Pleas at *Lancaster*, upon the usual notices &c. required by that Court. The affidavit required by the rule of *Hilary* term 6 *W.* 4., 6. (*a*) had not been filed.

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Ex parte MILLER.

Per Curiam (*b*). This case is not affected by the recent rule of Court: let him be re-admitted.

(*a*) Antè, p. 747.

(*b*) Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

SUMPTION *against* MONZANI.

Monday, *May* 9th.

C. C. JONES moved that the defendant might be discharged out of the custody of the marshal under stat. 48 *G.* 3. *c.* 123. *s.* 1., he having been imprisoned for twelve months in execution for a debt not exceeding 20*l.*

A prisoner in execution for a debt not exceeding 20*l.* cannot be discharged under stat. 48 *G.* 3. *c.* 123. *s.* 1., unless he has been actually within the walls for twelve months: residence within the rules is not sufficient.

Archbold appeared on notice to oppose the application, and referred to an affidavit by which it appeared that the defendant, during the twelve months, had been out of the actual prison and within the rules. This case falls within the principle of *Boughey* v. *Webb* (*a*), which was before *Littledale* J. in *Michaelmas* term 1835, where,

(*a*) The order was as in the text. According to the report in 4 *Dowl. P. C.* 320., the learned Judge decided that, if the prisoner had been only out on a day rule, that would not interfere with his right to be discharged; but that, if he was out without a day rule, he was not entitled to his discharge.

under

1836.

Scurfield against Morgan.

under similar circumstances, the learned Judge referred it to the Master, "to ascertain, whether the defendant has actually been within the walls of his Majesty's prison of the *Fleet*, as to the execution at the suit of the said plaintiff, for twelve successive calendar months, or whether he has had the benefit of the rules of the said prison during that time; if the Master shall be of opinion that the said defendant has been confined within the walls of the said prison for twelve months, at the suit of the said plaintiff as aforesaid, then that the said defendant be discharged out of the custody of the said warden, as to the execution at the suit of the said plaintiff, pursuant to the statute in that case made and provided;" and the rule was not afterwards drawn up, it appearing that in fact the defendant was within the rules. The act, according to the recital, is for the relief of "*certain* debtors in execution for small debts;" and the enacting part extends to those only "who shall have lain in prison" for twelve successive calendar months. There is no reported case on this point. In a subsequent part of the first section, the alternative stated is, "whether the person so in execution shall then be *actually detained in the gaol or prison* of the same court, or shall then stand committed on habeas corpus to the gaol or prison of another Court." It is clear that the legislature contemplated the case of actual custody only. [*Coleridge* J. In the Insolvent Debtors' Act, 7 *G.* 4. *c.* 57. *s.* 10., the expression is "any person who shall be in actual custody, within the walls of any prison." *Patteson* J. In the Bankrupt Act, 6 *G.* 4. *c.* 16. *s.* 5., the description of the act of bankruptcy is, "lie in prison for twenty-one days;" certainly those words are not satisfied by residence within the rules.]

C. C. Jones

18[illegible]

Summer[illegible] against [illegible] Mo[illegible]

C. C. Jones in support of the rule. The act will be construed liberally in favour of a prisoner. The words in stat. 32 *G.* 2. *c.* 28. *ss.* 13, 15, 16, are equally strong; yet this act has always been held applicable to the case of persons within the rules. The insolvent debtors' act 1 *G.* 4. *c.* 119. *s.* 4. has the expression "who shall be in actual custody;" the expression in 53 *G.* 3. *c.* 102. *s.* 1. is "a prisoner *in* any prison" "who shall have been in actual custody" for three months: but prisoners within the rules were always held entitled to the benefit of these acts. Then stat. 7 *G.* 4. *c.* 57. *s.* 10. uses the expression "any person who shall be in actual custody, within the walls of any prison:" and it is manifest that these words, if not controuled, would have extended to persons within the rules; for, by sect. 12., it is expressly provided that the act shall not extend to any person who shall not, at the time of filing the petition, &c., be "in actual custody within the walls of the prison, without any intermission of such imprisonment by leave of any court or otherwise." The stat. 48 *G.* 3. *c.* 123. *s.* 1., has no expression so strong as that of sect. 10. of stat. 7 *G.* 4. *c.* 57. In *Day* v. *Thomas* (*a*), on an application for a prisoner's discharge under stat. 48 *G.* 3. *c.* 123. *s.* 1., it was objected that, within the twelve months, he had several times broken the rules of the King's Bench Prison: and the Court referred it to the Master of the Crown office to inquire into that fact; and, if he found the prisoner had been out without a day rule, he was not to be discharged. In the compulsory clause of stat. 32 *G.* 2. *c.* 28. *s.* 16., the words are, "prisoners in execution *in* gaol;" now that clause

(*a*) *Chap. Pract. K. B.* 331. (2d ed.)

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would apply to a person within the rules. It is said that the words "certain debtors" shew that a limited class only was contemplated: but the limitation is merely to such as have been in execution for twelve months on debts under 20*l.*

Lord DENMAN C. J. The Court would be unwilling to decide, without consideration, against liberty; but we think that the words "lain in prison" must refer to persons who are within the walls. In *Day* v. *Thomas* (*a*) this particular point was not brought before the Court: and my brother *Littledale*'s decision, in *Michaelmas* term last, is in conformity with the view which we now take. I think, therefore, that this rule cannot be granted.

LITTLEDALE J. concurred.

PATTESON J. The words of the Bankrupt Act, 6 *G.* 4. *c.* 16. *s.* 5., are much like the words here. There is no case on the bankrupt acts exactly on the point; but some that go very near to it. Thus it has been held that, where a party was in custody of an officer in his own house, on account of illness, such imprisonment constituted a part of the two months (*b*): so, where a party had the benefit of day rules during his imprisonment (*c*). But it has never been decided that permanent residence within the rules satisfies the words.

(*a*) *Chap. Prac. K. B.* 331. (2d ed.)

(*b*) *Stevens* v. *Jackson*, 6 *Taunt.* 106.; *S. C.* 4 *Campb.* 164. This came under st. 21 *Jac.* 1. *c.* 19. *s.* 2., where also the words are "lie in prison."

(*c*) *Soames* v. *Watts*, 1 *C. & P.* 400. This also was under 21 *Jac.* 1. *c.* 19. *s.* 2.

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COLERIDGE J. The argument, that sect. 10. of 7 *G.* 4. *c.* 57. would comprehend the case of a person within the rules, because otherwise the twelfth section would have been unnecessary, fails upon reference to the language of the latter section, which introduces the words, "during all the proceedings," "without any intermission of such imprisonment:" these words have a distinct operation, and were not made necessary by the tenth section.

Rule refused (*a*).

(*a*) See *Gilbert* v. *Pape*, 2 *M.* & *W.* 311.

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Monday, May 9th.

ASSUMPSIT, upon a written agreement, for defendant's share of the expense of a certain partition of lands, and of the deeds for carrying it into effect, which expense was to be defrayed by the plaintiff and defendant in equal portions. The process was by writ of summons; the indorsement of the attorney's name was as follows:—"This writ was issued by *William Rosher*, of 40 *Stamford Street*, attorney for the said *Lance Tadman*." There was no other indorsement, except the date of the service. The defendant took out a summons to shew cause before a Judge at chambers, "why the writ of summons and service thereof

Whether an application, made before a single Judge at chambers, to set aside process for irregularity, be made early enough, is a question for his discretion; and the Court will not review his decision.

On such an application, made on the ground that the party's attorney is described as "of 40 *Stamford Street*" only: Held, that the Judge at chambers was to exercise his discretion in determining whether the description was sufficient; and the Court refused to entertain the question after he had decided it.

The Judge having considered such a description, on the copy of the writ served, insufficient, and having set aside the *writ and service* for irregularity, the Court amended the order by setting aside only the *copy of the writ, and service.*

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should not be set aside for irregularity." The parties attended before *Williams* J. at chambers; when the plaintiff took a preliminary objection, that under the circumstances (which are not important here) the application was too late. The learned Judge was of opinion that the application was in time. The defendant then said that he had two objections. The first was, that the description of the attorney's abode was insufficient: and his Lordship being of opinion that this was fatal, the defendant did not go into the second objection, which, as his attorney now stated in affidavit, was, that the amount of debt and costs was not indorsed on the writ. The learned Judge granted the order as prayed.

Erle, in this term, obtained a rule to shew cause why the order should not be rescinded. The affidavits on each side contained statements relating to the question, whether the application to the learned Judge had been made early enough.

Crompton now shewed cause. First, it cannot now be objected that the application to the single Judge was too late: that was a matter entirely in his discretion; and, in fact, the application was in time. [*Littledale* J. We ought not to go into the question: it is a matter for the discretion of the Judge.] Secondly, the description of the attorney's residence is insufficient under the Uniformity of Process Act, 2 *W.* 4. *c.* 39. *s.* 12., and schedule No. 1. In *Rust* v. *Chine* (*a*), "*Southampton Buildings*" was held insufficient, although it was urged that the place was well known, from its being much

(*a*) 3 *Dowl. P. C. 565.*

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resorted to by attorneys. In *Engleheart* v. *Eyre* (*a*), "*Gray's Inn, London,*" was held sufficient; but here *London* is not mentioned: the only objection there made was, that *Gray's Inn* was not in *London*. *Patteson* J. is reported to have said there that it had been held, in the Exchequer, that "*Ely Place*" was enough: but in that case the words must have been "*Ely Place, London;*" otherwise the learned Judge, in *Engleheart* v. *Eyre* (*a*), would have said that even *London* was unnecessary. [*Littledale* J. The case is often cited as shewing that "*Ely Place*" simply is sufficient. *Patteson* J. In *King* v. *Monkhouse* (*b*), "*Gray's Inn Square, London*" was held enough, though it was sworn that *Gray's Inn Square* was not in *London*.] That also was merely a question between *London* and *Middlesex*. [*Littledale* J. There was a late case in the Common Pleas (*c*), where the objection was that the parish was not specified: that was on the other form given in the schedule, being issued by a party in person: the words in that part of the schedule, and in the corresponding part of sect. 12 of the statute, are "city, town, or parish," &c. Lord *Denman* C. J. How can there be any general principle shewing that "*Stamford Street*" is bad, and "*Ely Place*" good? It must rest in the knowledge and discretion of the Judge.] Thirdly, the amount of the debt should have been indorsed, under the rule of *Hil.* 2 *W.* 4. II. (*d*). It will be objected that the order goes too far, inasmuch as the fault is in the indorsement only. But the indorsement is in fact

(*a*) 2 *Dowl. P. C.* 145.

(*b*) 2 *Dowl. P. C.* 221. See *Beckford* v. *Crutwell*, 1 *Moo. & R.* 187.

(*c*) Probably *Arden* v. *Jones*, 4 *Dowl. P. C.* 120., where "No. 1. *Clifford's Inn Passage, Fleet Street*, in the city of *London*," was held sufficient, though *Clifford's Inn Passage* is not extra-parochial.

(*d*) 3 *B. & Ad.* 390.

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part of the process, and must be considered a material part of the writ. The object of the rule was that the defendant's attention might be drawn to the amount of the debt, and that he might pay it if he pleased. It is true that in *Chalkley* v. *Carter* (*a*), where an objection was taken that, in the copy served, the words "on promises" were omitted, it was held that this was ground only for setting aside the copy, not the writ. There the copy served was wrong: here no objection is made to the copy, but to the writ. [*Patteson* J. The case seems to come under the 10th section of the rules of *Mich.* 3 *W.* 4. (*b*), which orders that, if the plaintiff or his attorney omit to insert in or indorse on any writ or copy any matter required by the act to be inserted or indorsed, the writ or copy shall not be held void, but may be set aside as irregular, on application to the Court or any Judge.] The irregularity is in the writ; that must therefore be set aside.

Erle, contrà. The abode of a *London* attorney seems to be sufficiently described by mentioning the street and number, without particularising the part of *London* in which it is to be found. And there is no ground for setting aside the writ, supposing it to have been wrongly indorsed. The copy and service may be set aside; then the writ, or more properly the indorsement on the writ, may be amended. In *Chalkley* v. *Carter* (*a*) the error was in the indorsement, as here. [*Patteson* J. Nothing but the copy there appeared to be bad.] The writ is not shewn to be bad here. The rule must therefore be made absolute for rescinding the order, as was done in *Chalkley* v. *Carter* (*a*).

(*a*) 4 *Dowl. P. C.* 480. (*b*) 4 *B.* & *Ad.* 3.

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Lord DENMAN C. J. The proper course is to amend the order of the learned Judge, by inserting in it the words "copy of the writ" instead of "writ," leaving the writ as it may be.

LITTLEDALE J. As to the first point, the learned judge having exercised the discretion vested in him, his decision should not be reviewed. With respect to the description of the attorney's abode, the sufficiency or insufficiency of it was a matter quite in the discretion of the judge. No general rule can be laid down. The *Strand*, and *Holborn*, for instance, are the only streets of that name; but there are streets which are of the same name as many others. So there is only one *Gray's Inn*. The Judge must decide these cases, which differ from cases on enactments prescribing the mention of a parish. Here the necessity is the less, because, by applying at the Master's office, and in other quarters, information may be obtained. Our decision should be, not to set aside the Judge's order, but to amend it, by converting it into an order to set aside the copy of the writ. The indorsement is not part of the writ, but something put on the writ: but as the plaintiff did not make this point before the Judge, he must pay his own costs.

PATTESON and COLERIDGE Js. concurred.

"Ordered, that the order of the honourable Mr. Justice *Williams* made" &c. "be amended, by directing the copy and service of the writ issued in this cause to be set aside; and that no costs be allowed on either side."

Monday, May 9th.

STOCKDALE *against* TARTE and Others.

In an action for libel, the declaration stated that plaintiff and *M.* had been duly convicted of conspiring to extort money from *C.*, and received judgment, but that defendant published that the counsel, who moved for judgment, had stated plaintiff to be the writer of a letter which was in fact written by *M.* Issue was joined on a plea of Not Guilty. Plaintiff, at the trial, proved the publication and the indictment and sentence, the letter being set out in the indictment as an overt act of the conspiracy, and called the counsel as a witness, who deposed that he had in fact made the statement. Held, that on this evidence it was properly left to the jury whether the publication was a libel, and, the jury having found a verdict of Not Guilty, that this was not contrary to the evidence.

THIS cause was tried before Lord *Denman* C. J. at the *Middlesex* sittings after *Hilary* term last, when a verdict was found for the defendants on two pleas pleaded to the whole action. On a former day of this term (*a*) *The Plaintiff* in person moved for a new trial on several grounds. The rule was refused except on the points mentioned in the judgment, as to which the Court took time to consider. These will appear sufficiently from the judgment; it is not thought necessary to mention those on which the rule was refused.

Lord DENMAN C. J. now delivered the judgment of the Court. This was an action for libel. The pleas were, Not Guilty, and a justification, that the alleged libel was a true report of what passed in a court of justice (*b*). The jury have found a verdict on both pleas for the defendants. All questions were disposed of by the Court at the time of the motion, except those which arise upon the verdict of Not Guilty.

The points are, whether I was right in leaving the question of libel or no libel to the jury; and, if so, whether their verdict is against evidence. It is to be observed that, as the jury have found a verdict for the defendants upon the plea of justification, which verdict

(*a*) *Friday, April* 22d. Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

(*b*) There were other issues found for the plaintiff.

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there is no pretence for disturbing, the plaintiff, even if he had a verdict upon the plea of Not Guilty, could have no damages nor judgment. Still, if there be misdirection, he is entitled to a new trial; or, if the verdict on that plea be against evidence, it may be fit that he should have such rule on payment of costs.

The present declaration sets out with alleging that the plaintiff had been duly convicted of conspiring with one *Montprivat* to extort money from a husband by threatening to calumniate his wife, and received the judgment of this Court for his said offence. And the grievance complained of is, that the defendants stated that the learned counsel who moved for judgment against them had declared the plaintiff to be the writer of one letter, which was not in fact written by him, but by his co-conspirator.

The plaintiff's evidence on the trial proved the great probability of the counsel alluded to having in fact stated that the letter was that of the plaintiff and not of *Montprivat*. That learned counsel, now Lord *Abinger*, appeared as a witness for the plaintiff, and made this statement: and the jury expressly found their verdict accordingly on the issue of justification. Moreover the evidence of the indictment and sentence, evidence also adduced by the plaintiff, shewed that the letter was set out as an overt act of the conspiracy whereof he was convicted, and consequently that it had appeared to be, in one sense, his letter.

Under these very particular circumstances, the plaintiff's own allegations making them a necessary part of his case and proof, we think that the character of the publication was properly part of the issue of Not Guilty, and that the question was properly left to the jury upon that

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that plea; and that their verdict was warranted by the evidence. Therefore no rule will be granted.

Rule refused.

The Earl of Scarborough v. *Doe dem. Savile* (in Error), decided in the Exchequer Chamber during this term, is reported, antè, vol. iii. p. 897.

The following cases, which stood over for consideration, after argument, and in which judgments were given in this term, viz.

The Governor, &c. of the Poor of Bristol v. *Wait*,
Rex v. *The Churchwardens of Dursley*,
Rex v. *The Principal, &c. of Barnard's Inn*,
Owen v. *Body*,
and
Graves v. *Hicks*, in which a certificate was sent to the Vice-Chancellor in *Hilary* vacation,

will be found in the next volume.

MEMORANDA.

IN *Hilary* term, 1836, the Lords Commissioners having resigned the Great Seal, the Right Honourable Sir *Charles Christopher Pepys*, Master of the Rolls, was appointed Lord High Chancellor, and created a Baron of the United Kingdom, by the name, style, and title of Baron *Cottenham*, of *Cottenham* in the county of *Cambridge*.

In the same term, *Henry Bickersteth*, Esq., one of his Majesty's Counsel, was appointed to succeed Sir *C. C. Pepys* in the office of Master of the Rolls; and was created a Baron of the United Kingdom, by the name, style, and title of Baron *Langdale*, of *Langdale* in the county of *Westmoreland*.

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verting this end into a bow, and inserting two bow windows, in the same direction, but not in the same situation, as the two former. Held, that, whatever privilege against the obstruction of light the windows of the original house possessed, this privilege did not apply to the three new windows.

Before *E.*'s house was built, the land on which it was built, together with some adjoining land, belonged to *R.*, who conveyed the land on which the house was afterwards built to *C.*, and *C.* agreed to sell to *E.*, who entered and built the house. Afterwards, and before the enlargement above mentioned, *R.* joined in a conveyance with *C.* (each as to his own estate), by which the house, with all lights and easements appertaining, and an additional part of *R.*'s land, were granted to *E.* *E.* having afterwards enlarged (as above described): Held, that neither *R.*, nor his assignees, were precluded from obstructing the three new windows by building on the land adjoining.

After the enlargment, *E.* assigned to *O.*, and *R.* afterwards assigned an additional piece of the adjoining land to *O.*; this piece lay to the north of *O.*'s house, and, in the conveyance, its southern boundary was described to be "the dwelling-house of *O.*" Held, that this did not operate as a recognition of the house in its then state, so as to preclude *R.*, or his assignees, from obstructing the new windows by building on other part of the adjoining land south of *O.*'s house.

In the case stated for the Court, by which it was agreed that the Court might draw conclusions of fact as a jury, it was stated that *R.*, at the time of his original conveyance to *C.*, was desirous of selling his land in building lots. The Court refused to take this into consideration, in interpreting the effect of the conveyance, which did not mention this, but called the land conveyed "arable land:" and they held, that *R.* was not precluded by this conveyance from obstructing the lights of the house afterwards built.

After the conveyance by *R.* and *C.* to *E.*, *R.* was told, by *E.*'s architect, that alterations were going on, but *R.* did not know the precise alteration intended to be made as to the windows. *R.* was told of the precise nature of other alterations, to which he assented, reserving to himself leave to build on his own ground, up to the wall of the house, in a part which did not contain the new windows. The Court refused to infer, as a fact, such a legal instrument as might be necessary to convert *O.*'s house into a dominant, and *B.*'s land into a servient, tenement with respect to the lights. *Blanchard* v. *Bridges*, 176.

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(1.) That the action lay for the 150*l.*, though no proof was given of *T.*'s assent to the order; and though, at the time of making the order, nothing was due from *T.*; and though, at the time of making the deed, there was not 150*l.* due from *T.*, and it was, at such times, uncertain to what extent defendant would be employed by *T.*; and though plaintiff was not a party to the deed.
(2.) That plaintiff was entitled to give secondary evidence of the order, upon proof of a bonâ fide search for the original among plaintiff's papers only.
(3.) That such secondary evidence was furnished by a paper, admitted by defendant's attorney to be a true copy of an affidavit sworn, but not filed, by defendant in proceedings against another party, such paper stating the order to have been written by the defendant, and setting it out, though no evidence was given that the attorney had compared the paper with the original affidavit or order.
(4.) That, on such secondary evidence, it must be presumed that the order was properly stamped.
(5.) That the deed was not a mortgage, but an absolute assignment of the defendant's earnings.
(6.) Upon its appearing that, at and since the time of executing the deed, less than 500*l.* was due from *T.* to defendant, and that not so much as would make up 500*l.* was likely to be earned from that time to the conclusion of defendant's employment with *T.*: Held, that the deed required no more than a 3*l.* stamp, under stat. *55 G. 3. c.* 184. Sched. Part. I. tit. *Conveyance*. *Pooley* v. *Goodwin*, 94.
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Declaration stated that defendant, being indebted to certain persons, agreed to repay plaintiff the amount of all accounts which he should settle for defendant; and also to pay plaintiff 40*l.* a quarter on stated days, till the said debts should be fully settled; and plaintiff agreed to advance to defendant 1*l.* per week, and certain other sums, out of the sums of 40*l.*; that, in consideration of plaintiff's promise, defendant agreed to perform the contract on his part; that plaintiff paid debts for defendant to divers persons (naming them) to the amount of 281*l.*; that the whole amount of debts was not yet settled; and that several sums of 40*l.* had become due from defendant under the agreement, which had been paid to the amount of 160*l.* only, but the rest were unpaid.

Plea,

Plea, as to two of the sums of 40*l.*, that, before they became due, plaintiff had omitted to pay certain of the debts due to creditors of defendant (naming them), other than the creditors named in the declaration, which he might have paid; and had also omitted, after the last payment of 40*l.*, to pay defendant 1*l.* per week; wherefore defendant in a reasonable time, and before the two sums in question were due, rescinded the contract.

Replication, that, before and at the time of the last payment of 40*l.*, defendant was indebted to plaintiff in the sum of 50*l.* and more, in respect of the monies paid by plaintiff for defendant, as in the first count mentioned; and that the said 40*l.* was insufficient to discharge the amount in which defendant was so indebted to plaintiff, and for which the agreement was a security:

Held, that the plea was bad, as shewing, at most, only a partial failure of performance by the plaintiff, which did not authorise the defendant to rescind the contract.

Quære, whether the replication was good. Held, by *Coleridge* J., that it was bad. *Franklin* v. *Miller*, 599.

ATTACHMENT.

I. Against bankrupt attorney, for non-payment of money.

Money was invested in stock, pursuant to a will, for the benefit of a legatee. An attorney obtained the legatee's authority, and a power from her trustee, to sell out the stock, representing that it might be better invested in a mortgage; and that he would find a proper security. The money was sold out, and the proceeds received and held by the attorney, he paying interest on the amount to the legatee, who did not know that the money had not been reinvested. Inquiries being afterwards made, he admitted, after some evasion, that he had not re-invested the sum; but, upon being further urged, promised that he would do so, and at length proposed a mortgage (which was thought insufficient) on property of his own. No further satisfaction being offered, the legatee moved the Court against him, and a rule was made, by consent (the attorney having filed no affidavit), ordering that he should re-invest the money in stock, on or before the 24th of *June* then next, and pay costs; and, on default, that an attachment should issue against him. The money was not re-invested, nor costs paid, and on *June* 25th a fiat in bankruptcy issued against the attorney, who, in *October*, obtained his certificate. The rule and allocatur were served, and the costs demanded, in *August*. On motion made afterwards for an attachment pursuant to the above rule:

Held, that, under these circumstances, the certificate was no answer to the application, and that the attachment might issue. *In re Newbery*, 100.

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2. The Court allowed an attorney to be admitted without a full term's notice, where all the other requisites had been complied with, and it appeared to be essential to his interests in his profession that he should sail for *India* before the regular time of notice would expire. The application was made on the second day of the term, and the admission was ordered to be on the last day of the same term. *In re Hancock*, 779.

3. Three days' notice must be given to the Master, under the rule of *Hil.* 6 *W.* 4., by persons applying to be admitted attorneys, exclusive of the day on which the notice is given, and of the first day of the term to which it relates. *In re Prangley*, 781.

II. Certificate:

II. Certificate: neglect to renew, its effect.

1. Where an attorney had ceased taking out his certificate, and practised in a Hundred Court (the practice of which was regulated according to that in *K. B.*) for the recovery of debts under *5l.*, and not elsewhere, the Court would not allow him to be re-admitted without paying his full arrears of certificate duty. *Ex parte Binns*, 1005.

2. An attorney who had practised regularly under a certificate, in this Court and the Court of Common Pleas at *Lancaster*, and had subsequently discontinued practice, and been employed as superintendent of collieries, and had afterwards been re-admitted an attorney in the Court of Common Pleas at *Lancaster*, all previously to R. *Hil.* 6 *W.* 4., 6., was, after that rule, re-admitted an attorney of this Court, without the affidavit required by the rule. *Ex parte Miller*, 1006.

III. Re-admission of. See *Antè*, II.

IV. Power to bring action on his bill pending order for taxation.

An attorney's bill was referred to taxation by a Judge of the Court of Common Pleas, who directed that the rule should not be acted upon till the attorney should have had time to make a certain motion to that Court. The motion was disposed of; and, on the second day afterwards, the client not having proceeded with the taxation, the attorney arrested her for the alleged amount of the bill. A Judge of the Court of King's Bench, on summons, set aside the proceedings and discharged the defendant out of custody, with costs, ordering the plaintiff also to pay the costs of the summons. Held that the discharge was right; and the Court would not review the order as to costs.

In discharging the rule for rescinding the Judge's order, it was made a condition that the defendant should not prosecute an action for a malicious arrest. Afterwards, the attorney's bill was taxed, and the balance due to him found to be only *369l.*, he having arrested for *800l.* The Court, on motion, refused to release the defendant from her undertaking not to prosecute the action.

Semble that, if a client obtain an order for taxing an attorney's bill, and take no further step for several weeks, the attorney cannot treat the order as waived, and arrest, but should himself cause the bill to be taxed, before proceeding against the client. *Shireff* v. *Lady Gresley*, 338.

V. Proceedings to be taken by, if client neglect to proceed with taxation. *Antè*, IV.

VI. Action against, for malicious arrest; when Court will order stay of proceedings. *Antè*, IV.

VII. Attachment against, for non-payment of money, notwithstanding bankruptcy. *Attachment*, I.

AUCTIONEER.

How far considered agent of Vendor and Vendee. *Vendor and Vendee*, IV.

AVERAGE.

What constitutes, in policy of insurance. *Insurance*, II.

AWARD.

I. Appointment of Umpire, how to be made.

Where arbitrators have decided the choice of an umpire by tossing up, the acquiescence of parties, subsequently to the choice, and before the reference is proceeded in, does not render the appointment valid, unless the parties acquiescing have knowledge of all the circumstances under which the choice was made.

Therefore, where one of two arbitrators objected to *S.* as umpire, and afterwards the two arbitrators tossed up, and the other arbitrator won, and named *S.*, and the attorney of one of the parties, knowing that the arbitrators had tossed up, but not knowing that one of them had objected to *S.*, proceeded in the reference, it was held that the irregularity was not cured. And this, though the ground of the arbitrator's objection to *S.* was negatived by affidavit. *In re Jamieson and Binns*, 945.

II. Construction of.

1. As to costs of several issues in cause referred. *Costs* I. 3. (1.)

2. How far decision of award will be referred to facts stated upon it.

An action on the case against an attorney, for negligently preparing a conveyance of land to the plaintiff, was referred to an arbitrator with all matters in difference. The plaintiff's case on the reference was, that many words in the deed were written on erasures, which were not noticed in the attestation; that the deed was in other respects incorrect and improperly prepared; and that, by reason thereof, the plaintiff was prevented from mortgaging. The arbitrator ordered a verdict to be entered for the defendant, and awarded that it was proved before him that the erasures in the conveyance mentioned in the pleadings were made before the deed was executed.

On motion to set aside the award, on the ground that the facts therein stated did not warrant a finding for the defendant:

Held, that the above statement of fact by the arbitrator did not shew that his decision proceeded on that fact; and, therefore, that no ground appeared for reviewing his award. *Lancaster* v. *Hemington*, 345.

3 Uncertainty as to damages awarded.

On the trial of a cause, a verdict was taken for 3000*l.* subject to a reference, the arbitrator to direct a verdict for plaintiff or defendant, as he should think proper; and to determine all matters in difference, except as to costs, the settlement of which was provided for by the order of reference. The arbitrator directed a verdict to be entered for plaintiff, (not saying for how much) and that defendant should, at a time and place named, pay plaintiff or his attorney 260*l.*:

Held, an uncertain award. *Mortin* v. *Burge*, 973.

III. Setting aside for uncertainty. *Antè*, II. 5.

BAIL.

What must be stated in affidavit to hold to bail. *Practice*, II.

BANK OF ENGLAND.

I. How far identified with transactions of branch banks. *Bankrupt*, I.

II. Notice to, how far notice to branch banks. *Bankrupt*, I.

III. Seal of, affixing how proved. *Evidence*, II, 1.

BANKRUPT.

I. Payments to, when within Bankrupt Act.

Giving cash for a bank post bill is a payment within the protection extended by stat. 6 *G.* 4. *c.* 16. *s.* 82. to "all payments really and bonâ fide made" to any bankrupt before the commission.

N. committed an act of bankruptcy, and on the same day absconded with two 500*l.* bank post bills drawn in *London*, payable to himself, which he afterwards indorsed in blank. At *Gloucester*, where a branch bank of the Bank of *England* is established under stat. 7 *G.* 4. *c.* 46. *s.* 15., he delivered the bills to *S.*, saying he wanted gold for them. *S.*, who was known at the branch, delivered them to the agent there, and received 1000*l.* in gold, first indorsing them, at the agent's desire, to the Governor and Company of the Bank of *England*. *S.* paid over the whole 1000*l.* to *N.*, having no interest in the bills, and having acted merely as his friend and agent. The commission had not then issued. Neither *S.* nor the bank agent knew of the act of bankruptcy. The bills were sent to the Bank of England from the branch, uncancelled. The practice at the branch banks, when bills are changed there, is, to take an indorsement, and send them up uncancelled: Held,

First, that the delivery of the 1000*l.* to *S.* for the bills was a transaction between the Bank of *England* and *N.* the bankrupt, by their respective agents.

Secondly, that the changing of the bills, whether considered as a purchase of them, or as a payment in discharge of the liability of the Bank, was not a valid transaction, unless protected by sect. 82. of the Bankrupt Act, as a payment made without notice of an act of bankruptcy.

N. absconded (as above stated) *March* 12th. Application was made by solicitors on the 16th to the Bank of *England*, to stop the bills, describing them, and stating that *N.* had absconded with them. On the 8th of *April* the same solicitors again applied at the Bank to the same effect, and it was then

then stated that a fiat of bankruptcy against *N.* was expected by every post. The bills were changed at *Gloucester, April* 12th:

Held, that there was sufficient notice to the Bank to take away the protection of 6 *G.* 4. *c.* 16. *s.* 82.; and that such notice to the Bank operated as notice to the branch bank, a reasonable time having elapsed for transmitting it before the bills were received there from *S. Willis* v. *Bank of England*, 21.

II. What sufficient notice of act of bankruptcy. *Antè*, I.

III. What constitutes reputed ownership. *Vendor and Vendee*, II.

IV. When goods in order and disposition of bankrupt within 72d section of Bankrupt Act. *Vendor and Vendee*, I.

V. When bankruptcy not sufficient answer to order of Court to pay money. *Attachment*, I.

VI. In whom is vested bankrupt's estate in customary freehold before admittance of assignees. *Manor*, II.

BARN.

Under what circumstances a chattel removable by a tenant at expiration of tenancy. *Landlord and Tenant*, XII.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. What constitutes a promissory note. *Stamp*, II.

II. When promissory note may be stamped as a mortgage. *Stamp*, II.

III. Indorsee of bill, how far affected by fraud of preceding indorser. *Post*, IV.

IV. Notice of non-payment of foreign bill, how to be given.

In giving notice of non-payment to the drawer of a foreign bill, resident abroad, it is sufficient to inform him that the bill has been protested, without sending a copy of the protest.

In an action by the indorsee of a bill who has given value, if his title be disputed on the ground that his indorser obtained the discount of such bill in fraud of the right owner, the question for the jury is, whether the indorsee acted with good faith in taking the bill. The question whether or not he was guilty of gross negligence is improper. Gross negligence may be evidence of mala fides, but is not equivalent to it. *Goodman* v. *Harvey*, 870.

V. Discharge of one of two joint and several makers of a note.

In assumpsit on a promissory note, it was pleaded that, *R.* owing plaintiff 299*l.*, plaintiff agreed with *R.*, *S. R.*, and defendant, that they should give plaintiff, and he should accept, their joint and several note for 299*l.* as a satisfaction and security for the debt, which was done. It was further pleaded that, the note being due, and the debt unpaid, and plaintiff having sued the three makers, it was agreed that the action should cease, and that the three makers should give their three joint and several notes for 52*l.* 18*s.* 8*d.*, at thirteen months, and 110*l.* 13*s.* 4*d.* and 56*l.* 13*s.* 8*d.* at longer periods, as a satisfaction and security for 200*l.* parcel of the debt due from *J. R.*, with interest; and the notes were so given. It was further pleaded that, the first note being due and unpaid, and the second (now sued upon) not yet due, *S. R.* agreed with the plaintiff to pay, and did pay him, 100*l.* in discharge of *S. R.*'s liability on the three last-mentioned notes, and plaintiff accepted the same in such discharge, and gave up to *S. R.* the first of the three notes, indorsed upon the note now sued upon a receipt of 47*l.* 1*s.* 4*d.* on account, erased *S. R.*'s name from this note, and discharged him from further liability thereon. These facts being admitted, and it being answered that the last-mentioned transaction with *S. R.* took place without defendant's knowledge or consent, which was not denied:

Held, that the discharge of *S. R.* by the plaintiff discharged the defendant. *Nicholson* v. *Revill*, 675.

VI. How far one of two joint and several makers of promissory note a competent witness for the other. *Evidence*, VII. 2, (2.)

VII. How identity of prior and subsequent indorser to be averred on pleadings. *Pleading*, XI.

VIII. On issue as to indorsement of bill, on which party proof lies.

Assumpsit by indorsee against acceptor of a bill of exchange. Plea,

that the bill was an accommodation bill, indorsed to plaintiff's indorser for the purpose of its being discounted for defendant's use; that it was indorsed to plaintiff in fraud of defendant, and that plaintiff took the bill, by such indorsement, after it was due. Replication, that the bill was indorsed to plaintiff before it became due, he not knowing the premises, without this, that plaintiff took it after it was due.

Issue thereon:

Held that, at the trial, it lay on the defendant to begin, by proving that the bill was due when indorsed. *Lewis* v. *Lady Parker*, 838.

IX. In hands of a tortious holder, how recoverable.

If a party receiving a bill payable to order, for the purpose of getting it indorsed for another person, procures the indorsement, pays in the bill to his own account at his banker's, with intent to appropriate the proceeds, and, before the bill is due, draws upon such account (though not specifically upon the credit of the bill), and his draft is honoured, an action of trover may be commenced against him before the bill is due, but not an action for money had and received. *Atkins* v. *Owen*, 819.

X. Giving cash for bill, how far a bonâ fide payment within protection of Bankrupt Act. *Bankrupt*, I.

BILL OF PARCELS.

How far considered a warranty. *Warranty.*

BISHOP.

Consistory Court of, whether a superior court. *Prohibition*, I.

BONA FIDES.

I. How far a justification of libel. *Libel*, I.

II. How far it supports title of indorsee of bill received from fraudulent indorser. *Bills of Exchange and Promissory Notes*, IV.

III. What is a bonâ fide payment within protection of Bankrupt Act. *Bankrupt*, I.

BOND.

I. What omissions in a bond will be supplied by inference.

To a declaration against the sheriff for an escape on mesne process, defendant pleaded that, before the alleged escape, and before the expiration of eight days from the arrest, he took a bail bond, duly subscribed with a condition according to the form of the statute, &c., and assigned it to the plaintiff, which the plaintiff took; and the replication traversed that any condition was subscribed according to the form of the statute, &c.

Held, that the defendant did not support his issue, by producing a bail bond, which was regular in all respects except that, in the recital of the condition, the writ, &c., was said to have been delivered "to the said ——;" and that, in the operative part of the condition, the words were "if the said —— do cause special bail, &c.;" the prisoner's name being omitted in those two places only. *Holden* v. *Raphael*, 228.

II. Replevin.

1. Duty of Sheriff in taking. *Sheriff* I., 2.
2. Action on; damages how to be estimated. *Sheriff*, I., 2.

BURGESS.

I. Election of, by an unlimited body; what constitutes a valid meeting. *Corporation*, I.

II. Right of, to inspect voting papers under stat. *5 & 6 W. 4. c. 76. s. 35. Corporation*, III.

CAPIAS AD SATISFACIENDUM.

Discharge out of custody for irregularity, when it may be. *Practice*, VIII., 1. (2).

CASE, SPECIAL.

When Court will judge as to correctness of inference from facts drawn by the Sessions. *Poor*, III., 4. (2.); VII.

CENTRAL CRIMINAL COURT.

Venue in indictment, how far conclusive as to place of trial. *Venue.*

CERTIFICATE.

I. Of Attorney; non-renewal of, its effect. *Attorney*, II.

II. Of Judge, as to costs, under stat. 43 *Eliz.*

43 *Eliz. c.* 6. *s.* 2., how far conclusive. *Costs*, VI.

III. Of Justices.

1. As to completion and repairs of highway. *Highway*, V. 1.

2. For sale, after stopping up highway. *Highway*, VII. 3. (2.).

CERTIORARI.

I. Prosecutor pro rege, when entitled to.

The rule, that a statute taking away certiorari does not bind the Crown unless named, is not limited to cases where the Crown has an actual interest, but extends to all prosecutions in the name of the King.

And the rule in favour of the Crown is not defeated by the prosecutor having become nominally defendant; as where a conviction has been quashed at sessions, with costs to be paid by the prosecutor, and he seeks to quash the order of sessions. *Rex* v. *Boultbee*, 498. (See remainder of placitum, *Conviction*, II.)

II. Application for, when Court will notice facts stated on affidavit. *Highway*, VII., 3., (2.).

III. Recognizances previous to removal. *Post*, IV.

IV. Removal of indictment by one of several defendants, its effect on the others.

Under stat. 5 & 6 *W.* 4. *c* 33., as well as by the antecedent practice, a certiorari obtained by one of several defendants removes the indictment as to all, and the previous recognizances of all are discharged, though the parties not applying for the certiorari do not give any fresh security.

Application being made, under such circumstances, for a procedendo, unless the defendants not suing out the certiorari would enter into recognizances, the Court refused a rule to shew cause. *Rex* v. *Boxall*, 513.

CHEQUE.

Delivery of, how far it constitutes payment.

To assumpsit for work and labour in making a railing, defendant pleaded, that before the action *he had paid to plaintiff* the sum of 8*l.* 11*s.*, *and plaintiff had received and accepted* the same, in payment and discharge of 8*l.* 11*s.* Replication, that *defendant did not pay to plaintiff* the said sum of 8*l.* 11*s.* in manner, &c.:

Held, that the defendant did not support his issue, by shewing that, before the action, he had sent plaintiff a cheque on his banker for 8*l.* 11*s.*, stated in the body of the cheque to be "balance account railing;" and that plaintiff held such cheque at the commencement of the action. A cheque so delivered, to operate as payment, must at any rate be unconditional.

And (per *Littledale* J.) a party to whom a cheque is sent may commence an action before he sends it back:

Held also, that it was no misdirection to leave it to the jury, only, whether the plaintiffs received the cheque as money. *Hough* v. *May*, 954.

CHURCH.

Rate. See *Mandamus*, II. *Prohibition*, I.; *Rate*, I.

CHURCHWARDENS.

I. Power to lease parish property. *Landlord and Tenant*, V.

II. How far entitled to books of surveyor of highway on his quitting office. *Highway*, VIII. 1.

III. Accounts of; what objections may be made to them. *Mandamus*, II., 5.

CLIFTON.

(*Gloucestershire*). What justices have jurisdiction over. *Statute*, XLI., 2.

COMMON.

Presumption of law as to property in uncultivated parts of common.

An inclosure act directed, that commissioners should award to a corporation, who were owners of the soil of certain commons, a twentieth part of the commons, by way of compensation. The Corporation, who were plaintiffs in an action of trespass, *quare clausum fregit*, having given evidence of acts of ownership in the locus in quo, the defendant, to shew that their right to it had been compensated for by allotments made by the commissioners, gave evidence that these allotments amounted to a twentieth part of the commons.

In contradiction to this evidence, plaintiffs proved that a part of the land, which they alleged to be the common, consisted of uncultivated strips of land between the cultivated parts of the common and the lands of private proprietors, called balks; and plaintiffs gave some evidence of property in these balks. The Judge having left the question of property in the locus in quo generally to the Jury, who found for the plaintiffs: Held, that it was not ground for a new trial, that the Judge did not tell the jury that, in presumption of law, the balks belonged to the owners of the adjacent land, unless the contrary were proved. Quære, as to such presumption. *Bailiffs of Godmanchester* v. *Phillips*, 550. (See remaining parts of placitum, *Evidence*, VII., 2, (1.) and *Corporation*, II., 1.)

COMPENSATION.

Under Railway Act. *Statute*, XLVI.

COMPULSION.

Recovery of money extorted under compulsion of colourable legal process. *Pleading*, I., 1.

CONSENT.

By party arrested, to dwelling-house to which to be taken; what constitutes. *Sheriff*, I., 1.

CONSISTORY COURT.

Of Bishop; whether a superior Court. *Prohibition*, I., 1.

CONSOLIDATION.

Rule in insurance cases.

Two actions having been brought by the same plaintiff against different defendants, on the same policy of insurance, the Court consolidated them, after a declaration had been delivered in one, and an appearance entered in the other, at the instance of the defendant in the latter action, though the plaintiff objected. *Hollingsworth* v. *Brodrick*, 646.

CONTEMPT OF COURT.

Purging of, how shewn.

On attachment for a contempt, where the defendant has been examined on interrogatories, and the Master of the Crown Office directed to report thereon to the Court, if he reports that the defendant has cleared himself of the contempt, the Court will not enter into a discussion of the correctness of such report, unless it appear, by the interrogatories and answers (*Semble*, not by affidavit), that the Master has been mistaken.

It is not sufficient ground for a review, that the Master's report appears contradictory to the opinion of a Judge, who granted the attachment. *Rex* v. *Morley*, 849.

CONTRACT.

I. Of sale; bill of parcels how far a warranty. *Warranty.*

II. Executory, for sale of goods.

1. Construction of. *Vendor and Vendee*, I.

2. When property vests in vendee. *Vendor and Vendee*, I.

III. What breach by one party will entitle the other to rescind the contract. *Assumpsit*, IV.

IV. Implied.

1. Between what parties it arises. *Pleading*, II.

2. How far it arises from covenant in lease, on tenant holding over. *Landlord and Tenant*, VI.; *Evidence*, XII.

V. Discharge of one of two joint and several contractors, effect of. *Bills of Exchange and Promissory Notes*, V.

CONVERSION.

What sufficient, to support trover. *Landlord and Tenant*, XII.

CONVEYANCE.

By what words right of way passes. *Way*, 1.

CONVICTION.

I. Form of; how penalty against several to be awarded.

A statutory conviction of *A.* and *B.* for an offence several in its nature (as an assault under stat. 9 *G.* 4. *c.* 31.) adjudging that they, the said *A.* and *B.*, for their said offence, do forfeit the sum

sum of, &c., and in default of payment be imprisoned for the space of, &c., is bad, inasmuch as the penalty ought to be imposed on the parties severally, and not jointly. And a party committed under such a conviction may recover in trespass against the committing magistrate. *Morgan* v. *Brown*, 515.

II. Appeal against; what objections may be taken at trial.

By the Game Act, 1 & 2 *W. 4. c.* 32, the justices, before whom any person is summarily convicted in penalties under that statute, may adjudge that such party shall pay the penalty immediately or at a future time, and, in default of payment, be imprisoned for a certain period; and it is enacted, that the conviction may be drawn in a certain form (corresponding with the above provision): that the party convicted may appeal to the sessions, giving notice to the complainant of the cause and matter of appeal, within three days after the conviction; and that no such conviction shall be quashed for want of form. A party, summarily convicted under the act, appealed, giving notice of several objections on the merits. By the conviction, when returned to the sessions, it appeared that the party was adjudged to pay the penalty forthwith, and that nothing was said of imprisonment in case of default. The sessions quashed the conviction on this ground, stating in their order that they quashed it for want of form. The objection was not taken in the notice of appeal, nor did it appear that the appellant, when he gave the notice, had means of knowing how the conviction would be framed.

Held that, assuming the conviction to be defective in substance, the sessions had no power to quash it on this objection, no notice of it having been given. *Rex* v. *Boultbee*, 498. (See remainder of placitum, *Certiorari*, I.)

CORPORATION.

I. Election into, by unlimited body; what constitutes a valid meeting.

To a quo warranto for exercising the office of mayor of a borough, the defendant pleaded that by charter the corporation had power to elect a burgess for mayor; and that, by custom, there was an indefinite number of free burgesses, and the mayor, bailiffs, and burgesses, being duly assembled, might elect whom they would for burgess; that he was elected burgess at a meeting duly assembled, according to the custom of the borough, and was afterwards duly elected mayor according to the charter. The Crown traversed the fact that the meeting, at which he was made a burgess, was duly assembled. It appeared, at the trial, that the meeting was not held on a day appropriated to the purpose of electing burgesses; and the jury found that the custom was to elect burgesses by the burgesses for the time being, who were indefinite in number; and that every resident burgess was to be served with a personal notice of the meeting, and, if he required it, of its object; but that the custom must be taken with the qualification that an accidental omission to serve a resident burgess, was not a violation of it. It also appeared that *R.*, a resident burgess, had told the officer whose duty it was to serve the notices, that he need not serve him, as he was frequently absent, and could hear tell of what was going on. The officer did not serve *R.*, who was, in fact, in the borough at the time of the meeting. The jury found expressly that the omission to serve *R.* was accidental:

Held, that the qualification of the custom, as to accidental omissions, was bad in law; and that the omission to serve *R.* was not accidental. *Rex* v. *Langhorn*, 538.

II. Corporate meeting, who must attend.

1. When number of members limited.

The charter of a corporation created two bailiffs and twelve assistants, and enacted that the bailiffs and assistants for the time being should be the common council of the borough; that the bailiffs and assistants, for the time being, or the greater part of them, of whom [eorum, quorum] the bailiffs should be two, should make by-laws, should elect the recorder and town-clerk, and should elect the bailiffs annually; if a bailiff died in office or was removed, the successor was to be chosen by the assistants for the time being, or the greater part of them; the assistants nominated in the charter to

hold for life unless removed by the bailiffs and assistants for the time being, or the greater part of them, of which part the bailiffs should be two, and to be removable by the bailiffs and assistants for the time being, or the greater part of them (without the quorum clause); and in that case, or in case of death, the successor to be elected by the bailiffs and assistants then living or remaining, or the greater part of them, (without the quorum clause), and so from time to time: Held, that a meeting, at which the two bailiffs and only six assistants were present, was not a regular corporate meeting for the purpose of accepting a resignation of a freeman, although the number of assistants was reduced below twelve by deaths; and that, consequently, a freeman was not made a competent witness by his resignation being accepted, and the acceptance entered in the book of the corporation at such meeting. *Bailiffs of Godmanchester* v. *Phillips*, 550. (See remaining parts of placitum, *Evidence*, VII., 2. (1.) and *Common*.)

2. When number of members unlimited. *Antè*, I.

III. Right of burgesses to inspect voting papers.

Semble, that, under the Municipal Corporation Act, *5 & 6 W. 4. c. 76. s. 35.*, the town clerk is not compellable to allow two burgesses at once to inspect the voting papers deposited with him after an election of town-councillors, or to give more than one of the papers to one person at the same time; but that he is bound to allow any burgess, who brings a list of his own, to compare it with the papers produced by the town clerk, and mark it according to what he finds there. *Rex* v. *Arnold*, 657.

IV. Jurisdiction of Justices within Clifton, (*Gloucestershire*). *Statute*, XLI., 2.

V. Corporation seal; attesting witness whether dispensed with. *Evidence*, II., 1.

VI. Member of, when a competent witness in action by Corporation. *Evidence*, VII., 2. (1).

VII. Municipal Corporation Amendment Act. *Statute*, XLI.

COSTS.

I. Of action.

1. Power of Court over.

In an action for work, labour, and materials, the plaintiff delivered a particular, claiming 1303*l.*, and stating that the full particulars could not be comprised in three folios. On summons for a better particular, with dates and credits, the plaintiff said he had no credits to give, and the summons was dismissed. The cause was afterwards referred, with all matters in difference; the costs to abide the event of the award. The plaintiff, in opening his case before the arbitrator, admitted payment of several sums, and claimed only 400*l.* The arbitrator awarded 63*l.* to the plaintiff for his alleged causes of action, and 9*l.* to the defendant for matters not in question in the suit.

Held, that the Court could not stay the taxation of the plaintiff's costs and order each party to pay his own.

Per *Patteson* J. A plaintiff is not bound, in his particular, to state the items of reduction which he admits; it is sufficient if he states the items of his own demand, and the amount admitted as going in reduction. *Smith* v. *Eldridge*, 64.

2. Of ejectment: payment of costs of former action before bringing of second action. *Ejectment*, IV.

3. Of different issues.

(1.) Construction of award.

In trespass quare clausum fregit, defendant pleaded to the whole action, (1.) Not guilty; (2.) Soil and freehold; (3.) Private right of way; (4.) Public right of way. By order of Nisi Prius, the cause was referred to a barister, the costs to be in his discretion, and to be recovered as if they were costs in the cause. The fourth issue was withdrawn from the cause by consent; but the arbitrator was to decide on the costs of the cause as if it had remained. The arbitrator awarded that the verdict on the first and second issues should be entered for the plaintiff, with nominal damages, and the third for the defendant; and that the plaintiff should pay the defendant his costs in the cause, such payment to be made on the expiration of fourteen days from the taxation.

Held,

Held, that the plaintiff was entitled to his costs on the first and second issues, and that each party was to bear his own costs of the fourth issue; the award being tatamount to a direction that the costs in the cause should abide the event of the cause. *Allenby* v. *Proudlock*, 326.

(2.) In replevin.

Where several pleas were pleaded under stat. 4 *Ann. c.* 16. and one party obtained a verdict on some of the issues, entitling him to the general costs of the cause, he was liable to pay the opposite party on the issues found for him, not only his costs of the pleadings, but his costs of preparing evidence on those issues. There was no difference in this respect between replevin and other actions. And the law was not altered by the General Rule *Hil.* 2 *W.* 4. I. 74. *Spencer* v. *Hamerton*, 413.

II. Of amendment of rule for judgment. *Mortgage*, IV.

III. Of mandamus. *Mandamus*, III.

IV. Of parties to interpleader rule. *Interpleader*, III.

V. Defendant's costs under 43 *G.* 3. *c.* 46. *s.* 3.

What will be presumed after verdict. *Pleading*, VIII., 1.

VI. Judge's certificate for, under 43 *Eliz. c.* 6. *s.* 2.

How far conclusive.

Where a Judge has certified to deprive of costs under stat. 43 *Eliz. c.* 6. *s.* 2. in a case within the statute, the Court cannot order the plaintiff's full costs to be taxed notwithstanding the certificate, on the ground that the Judge gave an erroneous reason for certifying. *Cann* v. *Facey*, 68.

VII. When Court will review Judge's order as to costs. *Attorney*, IV.

VIII. Security for: time for pleading. *Practice*, XVI.

COVENANT.

To repair: what implied contract it raises on tenant holding over. *Landlord and Tenant*, VI.

COURT.

I. Of arches. See *Prohibition*, I.

II. Central Criminal. See *Venue.*

III. Consistory, of Bishop. See *Prohibition*, I.

IV. Of Delegates. See *Prohibition*, I.

V. Ecclesiastical. See *Prohibition*, I.

VI. Hundred. See *Attorney*, II., 1.

VII. Inferior.

How far st. 2. *W.* 4. *c.* 39. and rules of court apply to causes removed from inferior court. *Pleading*, IV., 1.

CRIMINAL INFORMATION.

See *Information, Criminal.*

CROWN.

How far bound by statutes. *Certiorari*, I.

CUSTOM.

As to election of members of a corporation, what good. *Corporation*, I.

CUSTOMARY FREEHOLD.

Vesting of bankrupt's estate before admittance of assignees. *Manor*, II.

DAMAGES.

I. Unliquidated, whether within Statute of Limitations. *Statute*, III., 1.

II. Uncertainty as to, in award. *Award*, II., 3.

III. In action against sheriff for taking insufficient sureties, how estimated. *Sheriff*, I., 2.

DEBTOR.

Discharge of one of two joint and several debtors, effect of. *Bills of Exchange and Promissory Notes*, V.

DELEGATES.

Court of, whether a superior court. *Prohibition*, I.

DEMISE.

I. What constitutes a present demise. *Landlord and Tenant*, I.

II. Of minerals: what interest lessee takes. *Landlord and Tenant*, XI.

DESERTION

Of child by father, what is proof of. *Infant*, II.

DEVISE.

I. What words pass a fee.

Testatrix devised estates to *N.* in fee, in trust to receive and apply the proceeds to the use of *S.*, the sister of the testatrix, for her life, and, from and immediately after the decease of *S.*, to convey the same to such uses as *S.* should by deed or will appoint. There was no devise over. *S.* died in the lifetime of the testatrix: Held,

1. That the death of *S.* in the testatrix's lifetime was not an implied revocation of the will.

2. That the estate devised to *N.* did not lapse by reason of *S.*'s death, but vested in *N.* at the death of the testatrix.

3. That the estate so vested in *N.* was an absolute legal fee. *Doe dem. Shelley* v. *Edlin*, 582.

II. What evidence admissible to explain ambiguity.

Devise to *A.* of the messuage in *S.* in which testator resided, with the buildings *to the same adjoining*, and all those several closes in *S.* aforesaid, called *C.*, *D.*, and *E.*, (with the brick-kiln erected thereon,) and *F.*, with their appurtenances, *part of the farm and lands then in testator's own occupation.* Devise, further, to *B.* of a second messuage, and of all other the testator's lands and hereditaments in *S.* except those before devised to *A.* Under this will, *B.* claimed two cottages in *S.* which, when the will was made, adjoined the messuage resided in by the testator, but were not in his occupation, and were divided by a wall, which he had built, from the messuage.

Held, that the words referring to the testator's own occupation applied only to the premises mentioned after the words "to the same adjoining;" that evidence was admissible to shew the situation of the premises, and by whom they were occupied; but that those facts, being proved, did not raise such an ambiguity as warranted the reception in evidence of declarations made by the testator when giving instructions for his will, to shew that he intended *B.* to have the cottages. *Doe dem. Preedy* v. *Holtom*, 76.

III. Under power: what sufficient attestation. *Power*, I.

IV. What operates as a revocation of a will. *Antè*, I.

V. Death of devisee in life-time of devisor, its effect on devise. *Antè*, I.

DISCHARGE.

Out of custody, of prisoner under civil process. *Practice*, VIII., 1. (2.); *Execution*, 2.

DISTRESS.

I. Power of mortgagee to distrain on tenant of mortgagor. *Mortgage*, IV.

II. What may be given in evidence on issue of rien in arrear. *Pleading*, XII.

DWELLING-HOUSE.

Taking party to, on arrest. *Sheriff*, I., 1.

EASEMENT.

I. Right of way, by enjoyment, under stat. 2 & 3 *W.* 4. *c.* 71.; pleading and evidence relating to. See *Pleading*, VI.

II. What proof will support description of way alleged as an immemorial way. *Highway*, III.

III. Ancient lights. See *Ancient Lights.*

ECCLESIASTICAL COURT.

Whether a superior Court. *Prohibition*, I.

EJECTMENT.

I. What constitutes adverse possession. *Adverse Possession.*

II. Striking out names of lessors of plaintiff at instance of defendant.

Ejectment was brought against tenant in possession on the several demises of *A.* and *B.* Application was made to strike out *B.*'s name, on affidavit that the tenant claimed under *B.*, that the action was defended to protect *B.*'s interest against *A.*, and that *A.* claimed under a conveyance from *B.*, which was asserted to be invalid by reason of fraud.

The Court granted the application, though *B.*, who was in the *East Indies*, had not expressly authorised it, grounds being shewn for inferring a general authority, in the party making the application, to act for *B.*'s interest with respect to the premises.

And

And this, although it was sworn, in opposition to the application, that the conveyance from *B.* to *A.* was bonâ fide and for good consideration, that *B.* had covenanted for further assurances to *A.*, that the insertion of the name of *B.* was necessary to give legal effect to the conveyance, and that *A.* was in circumstances enabling him to defray the expenses of the proceedings, and to indemnify *B.* *Doe dem. Hurst* v. *Clifton*, 809.

III. Entry of verdict on second demise after execution on first.

Ejectment being brought on two demises, and a verdict being taken for the plaintiff on one, and for the defendant on the other, and leave being reserved to the plaintiff to move to enter a verdict for him on the second demise, he is not precluded from doing so by his having obtained early execution on the verdict on the first demise, and possession having been taken under it. *Doe dem. Bank of England* v. *Chambers*, 410. (See remainder of placitum, *Evidence*, II., 1.)

IV. Stay of proceedings in second ejectment until payment of costs in a former one.

A. and *B.* jointly brought two ejectments on the same title, one against *C.* and the other against *D.*, and recovered in both. In a third, brought by *A.* and *B.*, on the same title, against *C.* and *D.*, the defendants had a verdict, and taxed their costs, but never made any express demand of them. The costs were never paid. Four years after the trial of the third cause, *B.* released to *C.* and *D.* his claim to the premises in dispute, in consideration of money, and of a covenant by *C.* and *D.* to suspend their claim against *B.* for costs. Afterwards *A.* died; and his son brought ejectment against *C.* and *D.* on the title relied upon in the former actions. Upon motion to stay proceedings till payment to *C.* and *D.* of the costs recovered by them:

Held, that the facts of this case did not take it out of the ordinary rule, and that the defendants were entitled to the stay of proceedings. *Doe dem. Rees* v. *Thomas*, 348.

ESTOPPEL.

I. What parish is estopped from shewing after order of removal unappealed against. *Poor*, VI.

II. How far mortgagor estopped from setting up defect in his own title, as against mortgagee. *Mortgage*, III., 1.

III. How far person claiming under mortgagor is estopped from setting up prior mortgage as against mortgagee. *Mortgage*, III., 2.

EVIDENCE.

I. Admissions.

1. Of one party to action, how far admissible against other parties claiming through him.

Ejectment against *T.*, the tenant in possession, and *L.*, who came in to defend as landlord. The lessor of the plaintiff having proved his title against *L.*, the latter set up the title of the tenant *T.*, who had paid rent to the lessor of the plaintiff as tenant from year to year. In order to shew the determination of *T.*'s interest, the lessor of the plaintiff produced an admission signed by *T.* after the commission day of the assizes, whereby he acknowledged having attorned to *L.*, upon *L.*'s executing a writ of possession in a prior ejectment. Held, that this admission was evidence against *L.* as well as *T.* *Doe dem. Mee* v. *Litherland*, 784.

2. By one partner of a firm, how far admissible against secret partners, who had retired. *Landlord and Tenant*, IX.

3. Order of removal acquiesced in by parish, how far conclusive evidence against parish. *Poor*, VI.

4. Proof by one party of execution of deed, through which opposite party claims.

In ejectment, the defendant, upon notice from the plaintiff, produced a deed; and it was proved that the defendant's attorney had stated, before the trial, that the defendant claimed through that deed: Held, that this entitled the plaintiff to put it in, without proving the execution, before the defendant's case was opened. *Roe dem. Wilkins* v. *Wilkins*, 86. (See remainder of placitum, *Adverse Possession*.)

II. Attestation.

1. Who considered attesting witness.

To

To an indenture of feoffment by the Bank of *England*, the seal of the Bank was affixed by a paper wafered to the indenture, on which paper was written, "Sealed by order of the Court of Directors of The Governor and Company of the Bank of *England*, 12th *December*, 1833. *J. K.* secretary:" Held, that *J. K.* was not an attesting witness, and that the execution of the feoffment might be proved by the seal, without calling *J. K.*

Quære, Whether, when there is an attesting witness to the affixing of the seal of a corporation, such witness must be called to prove the deed? *Doe dem. Bank of England* v. *Chambers*, 410. (See remainder of placitum, *Ejectment*, III.)

2. Proof by attesting witness, when dispensed with. *Antè*, II. 1. *Power*, I.

III. Written entries.

By person not charging himself.

Accounts of rent, signed by a person, styling himself clerk to a steward, but not shewn to have been employed by such steward, otherwise than by the accounts themselves, are not evidence, after the decease of both, to prove the receipt, either by the clerk or the steward, of sums of money therein mentioned. *De Rutzen* v. *Farr*, 53. (See remainder of placitum, *Trial, New*, I.)

IV. Parol evidence to explain written documents.

Ambiguity in will; what evidence admissible to shew testator's intentions. *Devise*, II.

V. Execution of documents: when proof dispensed with.

1. Documents more than thirty years old. *Power*, I.
2. Deed put in evidence by one party, through which the opposite party claims. *Antè*, I., 4.

VI. Secondary evidence of written documents.

1. What search for document necessary. *Assumpsit*, II., 2.
2. What admitted as secondary evidence. *Assumpsit*, II., 2.

VII. Competency of witnesses.

1. What examination may be gone into on the voir dire. *Post*, VII., 2. (1).
2. What interest disqualifies.

(1). Freeman in an action by Corporation.

A corporation brought trespass quare clausum fregit; defendant, who was not a member of the corporation (before the Rules of *Hil.* 4 *W.* 4.) pleaded; (1), Not guilty; (2), a right of common appurtenant to a messuage occupied by him. The case of the plaintiffs was, that only freemen had the right of common in respect of such occupation: Held, that a freeman of the corporation was not a competent witness for the plaintiffs, though no funds were shewn to belong to the corporation; and that stat. 3 & 4 *W.* 4. *c.* 42. *s.* 26. (which passed before the trial), did not remove the objection.

The freeman released to the corporation all his right, title, and interest as a freeman, or as occupier of any commonable messuage, and all interest in the lands, tenements, and other possessions of the corporation, and all right of common in the locus in quo belonging to him as a freeman, and all rights connected with the action: Held that, as he was himself a member of the body to which the release was made, it did not restore his competency.

The witness stated, on the voir dire, that he had been a freeman, but had resigned and been disfranchised at a corporate meeting: Held, that the defendant might, on the voir dire cross-examine him as to the number of persons present at the meeting, in order to ascertain whether it had been a regular meeting.

The witness on being asked, on the voir dire, how many assistants (who formed a constituent part of the meeting) were present, answered, that a book then in Court would shew: Held, that, on the voir dire, reference might be made to the book to ascertain what number was present. *Bailiffs of Godmanchester* v. *Phillips*, 550. (See remaining parts of placitum, *Corporation*, II., 1, and *Common*.)

(2.) One of two makers of a joint and several promissory note in an action against the other.

C. and *P.* made a joint and several promissory note for 200*l.* with interest.

P.,

P., being sued solely, pleaded illegality of consideration: Held, that *C.* was not a competent witness to support this plea.

And that it made no difference that *C.*, before action brought, had paid 100*l.* of the note, a year's interest being also due at the time of such payment; inasmuch as *C.*, in case a verdict were given against *P.*, would be liable to contribution in respect of that interest. *Slegg* v. *Phillips*, 852.

(3.) Parishioner in action by Churchwardens and Overseers. *Landlord and Tenant*, V. 2.

VIII. Stamp.

1. What raises presumption of an instrument being properly stamped. *Assumpsit*, II. 2.

2. When unstamped instrument so far incorporated with stamped instrument as to be admissible in evidence. *Landlord and Tenant*, I. See also *Post*, XII.

3. Agreement, for what purpose admissible in evidence without stamp. *Stamp*, III. 3.

IX. Way.

1. What proof will support description of way alleged as an immemorial way. *Highway*, III.

2. What may be given in evidence to prove user of way for forty years.

To support a plea (framed on stat. 2 & 3 *W.* 4. *c.* 71. *s.* 2) of a right of way enjoyed for forty years, evidence may be given of user more than forty years back. *Lawson* v. *Langley*, 890. See also *Pleading*, VI.

X. Onus of proof, on which party it lies.

1. Notice previous to binding of parish apprentice, on appeal against order of removal. *Poor*, III. 2, (.)

2. Indorsement after maturity of bill of exchange. *Bills of Exchange and Promissory Notes*, VIII.

XI. Document admitted and referred to by both parties at trial, but not produced in evidence; effect of, after verdict. *Sheriff*, I. 2.

XII. Terms of tenancy arising from old lease, how proved.

Declaration, in assumpsit, that defendant had held lands under a lease from *E.*, on certain terms, which were set forth on the record; that the reversion came to plaintiff; and that defendant, in consideration of an alteration of the rent, promised to hold of plaintiff on the same terms in all other respects; but that defendant broke the terms. Plea, Non Assumpsit. Plaintiff not having proved an express contract to hold of defendant on the old terms, Held, that he could not rely upon an implied contract, arising from the old lease, without putting it in evidence; and that the old lease could not be used as such evidence, unless properly stamped. *Walliss* v. *Broadbent*, 877.

XIII. What presumption arises from tenant holding over after expiration of notice to quit. *Landlord and Tenant*, IX.

XIV. Payment, how far evidenced by delivery and acceptance of cheque. *Cheque*.

XV. Evidence, how applicable to the record.

1. Variance between pleading and evidence.

(1.) Supplying omissions in bond. *Bond*, I.

(2.) Description of highway by termini. *Highway*, III.

2. Statute of Limitations.

(1.) Evidence to support plea. *Stamp*, III. 3.

(2.) What takes case out of statute.

In assumpsit on a promissory note bearing interest, proof that defendant, being sent to by plaintiff for money, paid 1*l.*, and said, "this puts us straight for last year's interest, all but 18*s.*; some day next week I will bring that up," is sufficient answer to a plea of the Statute of Limitations, no evidence being given of any other debt due from defendant to plaintiff. *Evans* v. *Davies*, 840. See also *Statute*, XXVIII.

3. Traverse with inducement, what it admits.

In prohibition by a party libelled in the Ecclesiastical Court for non-payment of a church rate, the plaintiff in his declaration alleged that the parish of *W.*, of which he was a parishioner, was immemorially divided into four townships, the inhabitants of which had been immemorially liable to repair the parish

parish church; that the rate was made for repairing the church, but was assessed upon three of the townships only, omitting *H.*, the fourth; and that defendants had libelled plaintiff, pretending that *H.* was not liable to such repair, by reason of some supposed law or custom, and had immemorially repaired a chapel of its own. Plea, that there was, and had been immemorially, a chapel in *H.*, where the inhabitants received all divine rites and services, and which they repaired and maintained exclusively by a rate on *H.*, and that from time immemorial no rate had been assessed on any person in *H.* for the repair of the parish church; without this, that the inhabitants of the four townships were liable to contribute to the repair of the parish church; conclusion to the country, and issue joined thereon.

At the trial, the plaintiff proved that *H.* was a part of the parish of *W.*; and it appeared, on cross-examination by the defendants, that *H.* had its own church or chapel, and churchwardens, and had not, at least for twenty-five years, paid church rates to the parish. The Judge held that the defendants were entitled to a verdict on this evidence, for that, issue being joined on the traverse, the matter of inducement in the plea was admitted, and the issue confined strictly to the matter of the traverse:

Held, that the plaintiff, joining issue on this traverse, could not be taken to have admitted the previous allegations; that the traverse, if too general, was not immaterial; that the parties must be taken to have intended to put in issue the liability; and that the defendants, on whom the onus of proof lay, were to prove the matters in the inducement making up the fact traversed. Held, also, that the mere fact, of a district in a parish having kept up a chapel of its own without coming on the parish rates, did not shew a custom in such district to maintain its chapel by rates levied on its own inhabitants; and that the traverse was therefore not proved. And the Court granted a new trial. *Craven* v. *Sanderson*, 666.

4. In particular actions.

(1.) Assumpsit.

[1.] Use and occupation.

What constitutes an hereditament under St. 11. *G.* 2. *c.* 19. *s.* 14. *Landlord and Tenant*, XI.

[2.] New assignment.

What may be given in evidence on plea of Non Assumpsit. *Pleading*, IV, 2.

(2.) Case. Excessive distress.

What may be given in evidence on issue of rien in arrear. *Pleading*, XII.

(3.) Trover.

What amounts to a conversion. *Landlord and Tenant*, XII.

EXECUTION.

Discharge out of custody.

1. Time of application to Court. *Practice*, VIII., 1. (2.).

2. Under stat. 48 *G.* 3. *c.* 123.

A prisoner in execution for a debt not exceeding 20*l.* cannot be discharged under stat. 48 *G.* 3. *c.* 123. *s.* 1., unless he has been actually within the walls for twelve months: residence within the rules is not sufficient. *Sumption* v. *Monzani*, 1007.

EXPENSES.

Of pauper, after suspended order of removal. *Poor*, II.

FATHER.

I. How far entitled to the custody of his child. *Infant*, I.

II. How far liable for necessaries provided for his child. *Infant*, II.

III. What is proof of desertion of child by father. *Infant*, II.

FEE.

What words pass an estate in fee. *Devise*, I.

FIXTURES.

What constitutes. *Landlord and Tenant*, XII.

FRAUD.

I. When proof of, necessary before granting attachment. *Attachment*, I.

II. Indorsee of bill of exchange, how far affected by fraud of preceding indorser. *Bills of Exchange and Promissory Notes*, IV.

GAME.

Conviction under Game Act.
What objections may be taken on appeal. *Conviction*, II.

GENERAL ISSUE.

Defence under, how far affected by new rules of pleading. *Pleading*, V., 1.

GRANT.

By what words a right of way will pass. *Way*, 1.

GUARDIAN.

Who entitled to custody of infant. *Infant*, I.

HABEAS CORPUS.

Effect of discharge after. *Infant*, I, 1..

HALF-PAY.

Interest of officer in. *Mandamus*, II., 3.

HEREDITAMENT.

What constitutes.
1. Under stat. 11 *G.* 2. *c.* 19. *s.* 14. *Landlord and Tenant*, XI.
2. Under local act. *Statute*, XLV.

HIGHWAY.

I. When road becomes a public highway under stat. 41 *G.* 3. *c.* 109. *Post*, V., I.

II. What proof will support allegation of an immemorial way. *Post*, III.

III. Description of by termini, what certainty necessary.

An indictment for obstruction of a public way, describing it as from *A.* towards and unto *B.*, is satisfied by proof of a public way leading from *A.* to *B.*, though turning backwards between *A.* and *B.* at an acute angle; and though the part from *A.* to the angle be an immemorial way, and the part from the angle to *B.* be recently dedicated.

B. was a church: the path from *A.*, after passing the point at which the obstruction took place, reached the churchyard, but not the church, before reaching the angle: Held by Lord *Denman* C. J., and semble, per *Coleridge* J., that this proof would not have supported an indictment describing the whole as an immemorial way. *Rex* v. *Marchioness Dowager of Downshire*, 232.

IV. To whom soil of road belongs *Post*, V.

V. Liability to repair.

1. Way, under stat. 41 *G.* 3. *c.* 109.

By an act for inclosing lands in several parishes and townships, it was directed that the allotments to be made in respect of certain messuages, &c., should be deemed part and parcel of the townships respectively in which the messuages, &c., were situate. And the commissioners under the act were directed, in their award, to make such orders as they should think necessary and proper concerning all public roads, "and in what township and parish the same are respectively situate," and by whom they ought to be repaired.

The commissioners by their award directed that there should be certain roads. One of these, called the *Sandtoft* road, passed between new allotments. The road was ancient. The part of the common over which it ran, before the award, was in the township of *H.*, and the road was still in that township unless its situation was changed by the local act and the award. The new allotments on each side were declared by the award to be in other townships than *H.* The award did not say in what townships the road was situate, nor by whom it was repairable.

Held, that the act, by changing the local situation of the allotments, did not, as a consequence, change that of the adjoining portions of road, and therefore that the road in question continued to be in *H.*

Held, by Lord *Denman* C. J., that, where the herbage of a road becomes vested, by the General Inclosure Act (41 *G.* 3. *c.* 109.), sect. 1., in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietors.

Held, further, by the whole Court, that, under sect. 9. of the General Inclosure Act, a road continued, as well as a road newly made, under the award of commissioners of inclosure, must be declared by justices in special sessions

to

to be fully completed and repaired, before the inhabitants of the district can be indicted for not repairing it. *Rex* v. *Inhabitants of Hatfield*, 156.

2. Turnpike road.

(1.) Where whole road not completed.

Where trustees are authorised to make a turnpike road from *A.* to *C.*, the entire road must be completed before the public can be compelled to repair any part. Although the road from *A.* to *B.* (an intermediate point) has been finished between twenty and thirty years, and repaired from time to time by the public; and although the road at point *B.* joins another public road which is complete. *Rex* v. *Edge Lane*, 723.

(2.) Where branch roads, contemplated by local act, not completed.

Where trustees under a turnpike act are empowered to make a road from *A.* to *B.*, and a branch from that road to *C.*, the public are not compellable to repair the main road, though complete in its whole extent, till the branch is finished. *Rex.* v. *Cumberworth*, 731.

VI. Obstruction.

What points may be made on trial of prosecution for obstructing.

Justices in petty session having made an order for stopping a highway under a local act giving an appeal, and the time for appeal having elapsed, it cannot be contended, on a prosecution for obstructing such way, that the order was bad because the justices were not properly summoned to the petty session.

Under stat. *55 G. 3. c. 68. s. 2.*, enacting that "when it shall appear, upon the view of any two or more" justices, that a highway is unnecessary, the same may be stopped by order of such justices, the order is not valid if it state only that the justices, *having viewed* the public roads within the parish, &c. (in which the road lies), *and being satisfied* that certain roads after mentioned are unnecessary, do order the same to be stopped up: and the objection may be taken on such prosecution, and at such time, as above. *Rex* v. *Marquis of Downshire*, 698. (See remainder of placitum, *Post*, VII., 4.)

VII. Stopping up.

1. In what it differs from diversion. *Post*, VII. 3. (2.)

2. View by justices, what necessary. *Post*, VII. 3. (2.)

3. What order of justices must state.

(1.) *Anté*, VI.

(2.) In an order of justices for stopping up a highway as unnecessary, under stat. *55 G. 3. c. 68. s. 2.*, the following recital:—"We, *A.*, *B.*, and *C.*, justices," &c., "assembled at a special sessions held" &c., on &c., "having upon view found" that a certain part of a highway called, &c. is unnecessary:—sufficiently shews that the justices viewed such highway together, and at the time when the order was made.

Such order, if not made on a joint view, would be bad.

A direction in such order, that the land of the discontinued highway be sold by the surveyors to *H. J. A.*, whose lands adjoin thereto, if he shall be willing to purchase the same, if not, to some other person or persons, for the full value thereof, is sufficient under stats. *55 G. 3. c. 68. s. 2.* and *15 G. 3. c. 78. s. 17.*, though the form of an order given in the schedule (No. xviii.) to the latter act introduces the words "for the full value thereof," after the words "purchase the same," as well as in the subsequent part of the sentence.

It is not necessary to the validity of such an order, that a certificate of sale should be subjoined to it, pursuant to stat. *13 G. 3. c. 78.* Sched. No. xix.; or that any direction should be given in the order, as to the application of the purchase-money.

A public highway led over the land of *H. J. A.* He opened another road over his own land, between the same points, which the public used, and they ceased using the former road. Nine years afterwards, he obtained an order of justices for stopping up the old road as unnecessary, under stat. *55 G. 3 c. 68. s. 2.* Held, by Lord *Denman* C. J. and *Patteson* J., that such order might properly be made, and that it was not necessary to proceed as in case of diverting a highway under *13 G. 3. c. 78. s. 16.*

Also, by Lord *Denman* C. J., *Patteson* and *Williams* Js., that the justices might properly state in their order that they

they had viewed the old road, if they had viewed the ground over which the right of way was, although the road itself had gone into disuse.

Also, by Lord *Denman* C. J. and *Patteson* J., that an order directing the surveyors to sell the soil of the old highway to *H. J. A.*, whose lands adjoin, if he will purchase, if not, to some other person, for the full value, is not bad, although *H. J. A.* be himself the surveyor; at least if no fraud appear.

The general rule is, that the Court will not, on application for a certiorari, notice objections raised by affidavit; at least where they might have been brought before the sessions on appeal. As to exceptions, quære. *Rex* v. *Justices of Cambridgeshire*, 111.

4. Effect of, on roads in continuation of highway.

By a local inclosure act, incorporating (so far as its provisions were not repugnant) the General Inclosure Act, 41 *G. 3. sess. 2. c.* 109., it was enacted that certain commissioners might set out and appoint highways over the lands, to be divided, &c., within the parish of *E.*, or over any of the old inclosed lands in the parish, and divert or stop up any of the present public or private carriage-roads, highways, or footpaths in the parish, observing certain conditions: and that all ways and paths in the parish not so set out or continued should be stopped up and extinguished, and deemed part of the lands to be divided, &c.: provided that no roads through any old inclosures of the parish should be stopped up, diverted, or altered, without an order of two justices.

A road, A, through old inclosures in the above parish, opened into the waste, and, at such opening, joined another road, B, which formed a continuation of A, and ran entirely over waste land. No valid order was obtained for stopping road A. Road B was not set out or continued by the commissioners: Held, that this omission did not extinguish road A and create a consequent stoppage of road B; but, on the contrary, that A remaining open for want of an order of justices, as a consequence, B remained open also.

Quære, if a road long used as a thoroughfare by the public be lawfully stopped at one end, whether the right of way over the remainder be gone. Per *Patteson* J., it is not. *Rex* v. *Marquis of Downshire*, 698. (See remainder of placitum, *Antè*, VI.)

VIII. Surveyor.

1. Books of, on his quitting office, who entitled to.

A surveyor of the highways, quitting office (before stat. *5 & 6 W. 4. c.* 50.), claimed a sum as due to him from the parish; and, on the sum being guaranteed to him, agreed to deliver up his books. The sum was afterwards paid. In pursuance of a resolution of vestry, the books were demanded of him for the then churchwardens; and, in a subsequent year, they were also demanded by the churchwardens of the latter year: Held, that the churchwardens and overseers of the latter year were not entitled to maintain trover for the books; and, semble, that no parish officer of any year was so entitled. *Addison* v. *Round*, 799.

2. Assessment of, under stat. 13 *G. 3. c.* 78., how to be pleaded. *Pleading*, IX.

IX. Right of Way. See *Way*.

HIRING.

Settlement by hiring and service. *Poor*, IV.

HOUSE.

Nomination of dwelling-house by party arrested. *Sheriff*, I. 1.

HUNDRED COURT.

Practice in, by uncertificated attorney, its effect. *Attorney*, II. 1.

IDENTITY.

I. Of causes of action in different counts of declaration, how far plea may shew. *Pleading*, V. 5.

II. Of prior and subsequent party to bill, how to be averred in pleading. *Pleading*, XI.

INCLOSURE.

Liability to repair highway, under General Inclosure Act. *Highway*, V. 1.

INDENTURE.

Of Apprenticeship.

1. Execution of. *Poor*, III. 3.
2. What it must state. *Poor*, III. 1.

INDICTMENT.

I. Venue, how far conclusive as to place of trial. *Venue.*

II. For nuisance, what a defence to. *Nuisance.*

III. Removal of, by one of several defendants. *Certiorari*, IV.

INDUCEMENT.

In pleading, when to be proved. *Pleading*, XV. 3.

INFANT.

I. Who entitled to custody of.

1. Where a person supposed to be improperly in custody is brought up on habeas corpus, the Court, if there appear no ground for restraint, will order that such person be at liberty to go where he pleases, and will, if necessary, give him the protection of an officer in going. But if the party be a legitimate child, too young to exercise a discretion, the legal custody is that of the father; and, if the mother has possessed herself of the child adversely to him, and he claims it, the Court will oblige her to deliver it up.

Nor will this rule be departed from on the ground that the father has formed an adulterous connection, which still continues, if it appear that he has never brought the adulteress to his house or into contact with his children, and does not intend to do so.

Semble, that the child would not be given into the father's custody if it appeared that in his hands it would be exposed to cruelty or to gross corruption. *Rex* v. *Greenhill*, 624.

2. A father claiming from his wife the custody of their legitimate infant child on habeas corpus, the Court, on a representation by the wife of his profligacy and cruelty, referred it to a barrister to determine as to the proper custody for the child, the wife (who was in contempt for disobeying the writ) and the husband consenting to abide by such determination. *Rex* v. *Dobbyn*, 644. (n).

3. Infant child in custody of the mother, brought up by habeas corpus at the father's instance. Ordered that the child remain with the mother; the father's access to be regulated by the Master. *Rex* v. *Wilson*, 645. (n).

II. How far father liable for necessaries found for child.

Quære, whether a father deserting his infant child be liable in assumpsit to a party who supplies the child with necessaries, no further proof of contract being given?

No such action can be maintained, if the father had reasonable ground to suppose that the child was provided for.

U. offered to *N.* to take care of *N.*'s child, without putting *N.* to any expense; upon which *N.* gave up the child to *U.* Afterwards *U.* gave up the child to *N.*'s wife, who was living apart from *N.*, in adultery; and afterwards the child, to escape cruel treatment by *N.*'s wife and the adulterer, returned to *U.*, who maintained it thenceforward: Held, that *N.*, who had no notice of the child's quitting *U.* at all, or of the cruelty, was not liable to *U.* for the maintenance of the child, inasmuch as the facts did not shew any desertion of the child by *N.*, and negatived a contract between *N.* and *U.*

And that it made no difference that *U.*, when she made the original undertaking, was a married woman; the ground of the decision being, not that *U.* had made a valid contract, but that the circumstances negatived desertion; and that, therefore, the question as to the implied liability did not arise. *Urmston* v. *Newcomen*, 899.

III. What is proof of desertion of child by father. *Antè*, II.

INFERIOR COURT.

How far stat. 2 *W.* 4. *c.* 39. and rules of Court apply to causes removed from inferior courts. *Pleading*, IV. 1.

INFORMATION, CRIMINAL.

I. During pendency of other proceedings.

The Court refused a rule for a criminal information for an assault, upon its appearing that the applicant had taken out a warrant against the other party, though the applicant offered that it should be part of the rule that he

he should abandon the proceedings on the warrant. *Ex parte* ——, *Gent., One*, &c., 576. (n). And see *Judgment*, III.

II. Where there is no intention to provoke breach of the peace.

The Court will not grant a criminal information for calling a magistrate a liar, accusing him of misconduct in reference to his having absented himself from an election of clerk to the magistrates, and threatening a repetition of the same language whenever such magistrate came into the town, unless there appear an intention to provoke a breach of the peace. *Ex parte Chapman*, 773.

INSOLVENT.

General meaning of the term.

Defendant gave a warrant of attorney to plaintiff to secure the payment of a debt by instalments. Shortly before the first instalment was due, defendant told plaintiff that he feared he could not meet it, and that, unless time was given him, he would make over his effects for the benefit of his creditors.

An agreement was then entered into between plaintiff and defendant, that defendant should give his acceptance for a part, and pay the rest by instalments according to his ability, so as to discharge all before *April* 1st, 1836; and that plaintiff should not enter up judgment unless defendant should dispose of his business or *become bankrupt or insolvent*.

Defendant paid the acceptance when due. Afterwards, and before *April* 1st, 1836, defendant asked plaintiff to make him a bankrupt, in order to relieve him from his difficulties, and said that he could not pay 20*s.* in the pound, and that his assets were 200*l.*, and his debts 300*l.*

Held, that plaintiff might enter up the judgment and take out execution, defendant appearing to be insolvent in the sense contemplated in the agreement; and that the facts above stated did not shew that plaintiff, at the time of the agreement, knew defendant to be insolvent in that sense.

The expression "becoming insolvent" means a general inability to pay debts, and does not signify taking the benefit of the Insolvent Debtors' Act, unless the context so restrains it. *Biddlecombe* v. *Bond*, 332.

INSURANCE.

I. Construction of words "port of lading" in a policy.

Insurance on a ship "at and from her port of lading in *North America* to *Liverpool*." She took in part of her cargo at *K.*, in *New Brunswick*, and then sailed from thence to *B.*, in the same province, seven miles distant, on the same bay of the sea. She there completed her cargo, and then returned to *K.* to receive provisions, &c., after which she sailed for *England*, and was lost on the voyage. *B.* was not in the way from *K.* to *Liverpool*. *B.* and *K.* were situate on creeks opening into the bay, and were spoken of by some persons as ports, but neither of them had a custom-house. They had custom-house officers, and were under the jurisdiction of the custom-house of *St. John, New Brunswick*.

Held that, after the ship had begun to load at *K.*, that was her port of lading; that the term "port of lading" in the policy did not allow of her afterwards going to *B.*, and that her doing so was a deviation. *Brown* v. *Tayleur*, 241.

II. To what loss underwriters liable.

Insurance on a ship, *V.*, with the usual warranty as to average. The ship having come into collision with another ship, and proceedings being instituted for the damage done to the other ship, the matter was referred to arbitrators, who awarded that each ship should bear half of the aggregate loss. The ship *V.* on the settlement had to pay a balance to the other ship: Held, not to be a loss to which the underwriters were liable.

Held, also, that the expense of the wages and provisions of the crew of the *V.*, during the time that she was detained in repairing damage done to herself by perils of the sea, were not such a loss. *De Vaux* v. *Salvador*, 420.

III. Consolidation rule. *Consolidation.*

INTEREST.

I. What naval officer has in his half-pay. *Mandamus*, II. 3.

II. What grantee of allowance by Lords of Treasury has in his allowance. *Mandamus*, II. 2.

INTERPLEADER.

I. When Court will interfere to protect Sheriff. *Sheriff*, VI.

II. Revival of rule, when it will be made.

A sheriff having taken goods in execution, which were claimed by a third party, obtained an interpleader rule. The parties appeared; and a rule was made that the parties should appear in the next term, and maintain or relinquish their claims, &c., and that, in the meantime, the sheriff should continue in possession till further order of the Court, and proceedings against him be stayed; and that a feigned issue should be tried between the claimants at the next assizes. The issue was tried, and the third party obtained a verdict against the execution creditor. The latter obtained a rule for a new trial, which rule, after the lapse of five terms, was discharged. The sheriff had, by direction of the execution creditor, quitted possession before the rule for a new trial was discharged. The interpleader rule had never been enlarged, or in any manner formally continued:

Held, that the Court might, nevertheless, act upon the interpleader rule for the purpose of awarding to the successful party his costs of appearing to the sheriff's rules, and costs of keeping possession, if properly incurred by such party. *Levy* v. *Champneys*, 365.

III. Costs under. *Antè*, II.

IRREGULARITY.

I. In form of declaration for not complying with rules of Court. *Pleading*, IV. 1.

II. Setting aside process for; power of Judge at chambers. *Judge*, III. 2.

JUDGE.

I. Certificate of, for costs, under 43 *Eliz.* c. 6. *Costs*, VI.

II. Right of, to discharge Jury from giving verdict on some of several issues. *Verdict*, II.

III. When Court will review Judge's order.

1. *Attorney*, IV.

2. Whether an application, made before a single Judge at chambers, to set aside process for irregularity, be made early enough, is a question for his discretion; and the Court will not review his decision.

On such an application, made on the ground that the party's attorney is described as "of 40, *Stamford-Street*" only: Held, that the Judge at chambers was to exercise his discretion in determining whether the description was sufficient; and the Court refused to entertain the question after he had decided it.

The Judge having considered such a description, on the copy of the writ served, insufficient, and having set aside the *writ and service* for irregularity, the Court amended the order by setting aside only the *copy of the writ, and service*. *Tadman* v. *Wood*, 1011.

JUDGMENT.

I. Amendment of rule for judgment.

1. When it may be made. *Mortgage*, IV.

2. Costs of. *Mortgage*, IV.

II. Entry of, nunc pro tunc. *Practice*, X. 2.

III. On criminal conviction, during pendency of action for same offence.

A defendant being brought up for judgment for an assault, and it appearing that the prosecutor had commenced an action, which was still depending, for the same assault, the Court refused to pass any judgment except that the defendant should give security for his good behaviour, he having used violent language towards the prosecutor in addressing the Court.

And this, although, at the time of the defendant being brought up, the prosecutor offered to discontinue the action. *Rex* v. *Mahon*, 575.

IV. Non obstante veredicto, when it may be. *Pleading*, VIII. 2.

JURY.

I. What they may determine in action for libel. *Libel*, II.

II. Right of Judge to discharge Jury from giving verdict on any issue. *Verdict*, II.

III. Right

III. Right of plaintiff to bring another action after withdrawal of a Juror at trial. *Practice*, XI.

JUSTICES.

I. Order of.
1. For stopping up highway, what it must state. *Highway*, VI. and VII. 3.
2. For payment of church-rate, appeal against. *Rate*, I. 6.
3. Objections to, what Court will notice on application for certiorari. *Highway*, VII. 3.

II. Certificate of, as to repairing and stopping up highway. *Highway*, V. and VII. 3.

III. Mandamus to. *Mandamus*, I. 2.; II. 5.

IV. Trespass against, for commitment under irregular conviction, when it may be maintained. *Conviction*, I.

V. Jurisdiction of, within Clifton (*Gloucestershire*). *Statute*, XLI. 2.

KING.

By what statutes bound. *Certiorari*, I.

LANDLORD AND TENANT.

I. What constitutes a present demise.

By a paper entitled a memorandum of agreement, signed by plaintiff and defendant, it was recited that defendant and *W.* had agreed to abandon the annexed contract for taking and letting certain lands; that plaintiff and defendant agreed, the former to take, the latter to let, the lands, upon the conditions contained in the annexed contract; "the said rent to be annually paid by quarterly payments, and to be in amount 220*l.*; and we further bind ourselves to the other to execute a similar agreement to the one recited and referred to." This agreement had a 3*l.* stamp. The annexed agreement had no stamp, and was, in effect, a lease from the defendant to *W.* setting out regularly the terms of the tenancy, &c.

Held, that the stamped agreement incorporated the unstamped one, and that the two together might be given in evidence as a lease on the terms contained in the unstamped one. *Pearce* v. *Cheslyn*, 225.

II. What tenancy created by payment of rent after void lease. *Post*, V. 1.

III. Terms of tenancy, arising from old lease, how proved. *Evidence*, XII.

IV. Lease, granted under a power given by deed, how far binding on parties to deed. *Mortgage*, IV.

V. Lease of parish property, by whom to be made.

1. In ejectment on the demise of the churchwardens and overseers of a parish, laid after the passing of stat. 59 *G.* 3. *c.* 12. (the seventeenth section of which vests all real property belonging to the parish in the churchwardens and overseers in succession, as a corporation), the lessors of the plaintiff proved that the defendant, ever since the passing of the statute, and for many years before, had paid rent to the churchwardens of the parish for the time being, and that the late churchwardens and overseers (who came into office after the statute passed) had given him notice to quit.

Defendant produced a lease for years, by *T. K.* and *J. K.*, therein described as churchwardens of the parish, to *W. E.*, made before the statute, in consideration of the surrender of a former lease; and also a lease for a term of years, yet unexpired, made before the statute, by *J. M.* and *N. C.*, described as churchwardens of the parish church, to *W. E.*'s personal representative, through whom defendant claimed, in consideration of the surrender of the lease first mentioned. In the last-mentioned lease the premises were described as "belonging to the parish church," and the rent was reserved payable to "the said churchwardens and their successors."

On a special case, stating these facts: Held,

That the property appeared to be parish property; that the leases passed no legal interest; and that the property, since the statute, was in the churchwardens and overseers in succession, who were intitled to treat the defendant as tenant from year to year, and to recover the premises upon giving notice to quit. *Doe dem. Higgs* v. *Terry*, 274.

2. In ejectment by churchwardens

and overseers, on demises laid after stat. 59 *G. 3. c.* 12., it appeared that the defendants, before and since the statute, had paid rent to the successive churchwardens, and that the late churchwardens and overseers (appointed since the statute) had given a proper notice to quit. Defendants produced a lease, made before the statute, for fifty-nine years, to parties under whom they claimed, purporting to be made *with the consent of the vicar, the majority of the aldermen and burgesses of the borough of* R. *and of others the inhabitants of the parish*, whose names were subscribed to a memorandum on the back of the lease expressing such consent. The churchwardens were the demising parties, and the rent was made payable to them and their successors for the time being. The premises were described as belonging to the parish church.

On a special case stating these facts: Held that, notwithstanding the consent expressed as above, the premises must be taken to have been parish property, demised by the churchwardens as such; and consequently that the lease passed no legal interest in the term, and the present churchwardens and overseers might treat the lessees as tenants from year to year:

Held, further, that a parishioner, liable to poor's rate, was, at common law, a competent witness for the plaintiff in such action, no evidence being given that the premises were of any annual value beyond that at which they were demised. *Doe dem. Hobbs* v. *Cockell*, 478.

VI. Covenant to repair: how far it raises an implied contract on tenant holding over.

A. demised to *B.*, for a term of years, two messuages; the lease contained a covenant by *B.*, that he would, during the term, keep the premises in repair, and leave them, at the end of the term, in good repair and in the same state as they were in at the beginning. At the end of the term, the messuages were out of repair, and had been converted into a single house. *B.* held on without a fresh lease, and *C.* afterwards purchased the reversion of *A.*, and *B.* continued to hold on under *C.*: Held,

1. That *B.* was not liable in assumpsit on an implied contract to put the messuages in such repair, and in the same state as they were in at the commencement of the term.

2. That, supposing *B.* so liable, *C.* had no right of action for breaches of the contract committed before he purchased the reversion. *Johnson* v. *Churchwardens of St. Peter, Hereford*, 520.

VII. Trustees of a term; nature of their reversionary interest. *Mortgage*, IV.

VIII. Relative situation of mortgagee and tenant in possession. *Mortgage*, IV.

IX. What presumption arises from tenant holding over after notice to quit.

In assumpsit for rent of coal, the issue being whether or not the defendants, having given notice to quit, had afterwards waived the notice and continued the tenancy, it was proved that, after the time fixed by the notice had expired, they continued for two months working out certain portions of the coal, which, however, as they contended, it was usual for a tenant to take away on abandoning such a work: Held, that it was for the jury to decide on this issue, whether or not the defendants, in remaining for the two months, intended to waive the notice and continue the tenancy.

During all the time above-mentioned, the defendants constituted a firm, called the *Llangonneck* Coal Company. After the expiration of that time, the company appointed an agent. On the trial of the above action the plaintiff offered in evidence a letter of the agent, to shew a recognition, by the firm, of a continuing tenancy. Before the letter was written, or the agent appointed, two of the defendants had withdrawn from the firm, but the business was still carried on in the name of the *L.* Coal Company, and no notice of the change had been given to the public: Held, that the letter was inadmissible. *Jones* v. *Shears*, 832.

X. For what breaches of contract reversioner may maintain action against tenant. *Ante*, VI.

XI. When use and occupation maintainable.

A. agreed with *B.* to take a lease of *B.*'s iron ore at *N.* for forty years, at a certain rent, engaging to work the several veins of ironstone, limestone, &c., in certain stipulated proportions; and *B.* agreed to grant such lease.

Held, that by this agreement *B.* took, not a mere licence, but a right constituting an hereditament within stat. 11 *G.* 2. *c.* 19. *s.* 14., in respect of which *A.* might sue him for use and occupation. *Jones* v. *Reynolds*, 805.

XII. Fixtures; what constitutes.

A tenant is entitled, at the expiration of his term, to remove a wooden barn which he has erected on a foundation of brick and stone, the foundation being let into the ground, but the barn resting upon it by weight alone.

He may maintain trover for such a barn, against a party converting it.

If the reversioner, having refused, while off the premises, to allow such tenant to take away the barn, afterwards, while a third party is in possession of the land, come on the land and prevent the tenant from entering to take the barn away, this is a conversion by the reversioner. *Wansbrough* v. *Maton*, 884.

XIII. For what tenant may maintain trover at expiration of his tenancy. *Antè*, XII.

LEASE.

See *Landlord and Tenant.*

LIBEL.

I. Bona fides, how far a justification.

Declaration complained that defendant published an advertisement in a newspaper, stating that a capias had issued against plaintiff, and that it had been impracticable to take him, and offering a reward for such information to be given to the sheriff's officer as would enable him to take plaintiff; innuendo that plaintiff was in indigent circumstances, incapable of paying the debt, and keeping out of the way to avoid being served with process. Plea, that a capias had been issued, indorsed for bail, and delivered to the sheriff; that defendant had kept out of the way to avoid being taken; that the sheriff's officer had been unable to take him; and that defendant had published the advertisement, at the request of the party suing out the writ, within four calendar months of the date of the writ, to enable the sheriff and his officer to arrest. Held, a justification. *Lay* v. *Lawson*, 795.

II. What put in issue by plea of not guilty.

In an action for libel, the declaration stated that plaintiff and *M.* had been duly convicted of conspiring to extort money from *C.*, and received judgment, but that defendant published that the counsel, who moved for judgment, had stated plaintiff to be the writer of a letter which was in fact written by *M.* Issue was joined on a plea of not guilty. Plaintiff, at the trial, proved the publication and the indictment and sentence, the letter being set out in the indictment as an overt act of the conspiracy, and called the counsel as a witness, who deposed that he had in fact made the statement. Held, that on this evidence it was properly left to the jury whether the publication was a libel, and, the jury having found a verdict of Not Guilty, that this was not contrary to the evidence. *Stockdale* v. *Tarte*, 1016.

LICENCE.

To a claim of right of way under prescription act; pleading and evidence relating to. *Pleading*, VI.

LIEN.

Of vendor on goods, when divested. *Vendor and Vendee*, II.

LIGHTS.

See *Ancient Lights.*

LIMITATIONS.

Statute of. See *Statute*, III., XXVIII.

LOCAL ACT.

See *Statute*, XLII.—XLVI.

MAGISTRATES.

See *Justices.*

MALA FIDES.

How far it differs from gross negligence. *Bills of Exchange and Promissory Notes* IV.

MANDAMUS.

I. When it lies.

1. To Lords of Treasury to pay over money received by them for a party under a vote of Parliament.

The Lords of the Treasury agreed to submit a vote to parliament for granting a retired allowance to a public officer, on certificate of ill-health, according to stat. 3 *G.* 4. *c.* 113. The vote passed, but the pension was not specifically mentioned in the appropriation act, which, however, directed a gross sum to be applied in discharge of retired allowances. The Lords of the Treasury, on application by the party for payment, informed him that he might receive it from a treasury officer whom they named. The officer declined paying, inasmuch as he had no authority from the Lords of the Treasury, and they, being again applied to, refused to give such authority except on condition that the party would forego certain legal proceedings, which he refused to do.

Held, first, that the party had a legal right to the allowance, the Lords of the Treasury having submitted the grant to parliament, and having afterwards admitted that the money for paying the allowance was in their hands.

Secondly, that a mandamus lay to the Lords of the Treasury to order payment, inasmuch as the claimant had no other remedy; and as the writ was demanded, not against the King, but against officers into whose hands money had been paid under an act of parliament for the use of an individual. *Rex* v. *Lords Commissioners of Treasury*, 286.

2. To Justices in petty sessions to adjudicate on disputed facts.

On complaint against a party as a vagrant, for refusing to maintain his wife, the party charged, being called upon by the justices in petty sessions to shew cause for his refusal, denied being married to the woman, and produced some evidence in support of such denial: and he threatened the magistrates with an action if they committed him. The complainants offered evidence of a *Gretna Green* marriage; but the justices refused to hear it, and dismissed the summons, saying that they would not, on this application, try a disputed marriage, alleged to have taken place out of the country, and that the parties ought to try it in the Ecclesiastical Court.

Held, that the justices could not, under these circumstances, refuse to hear the case through; and a mandamus was granted, requiring them to hear the complaint. *Rex* v. *Justices of Cumberland*, 695.

II. When it does not lie.

1. To Lords of Treasury to pay money which has not come to their hands.

Under stats. 50 *G.* 3. *c.* 117. and 3 *G.* 4. *c.* 113., the Lords of the Treasury were not authorised to grant retired allowances for life. A grant of such allowance made by them in general terms was subject to the discretion of parliament in voting the supplies from year to year, and was revocable by the Lords of Treasury.

And, where the Lords, after granting such allowance on the abolition of an office, had revoked the grant, but the allowance had been erroneously inserted in the estimates of the year, voted by parliament, and included in an appropriation act, this Court refused to inquire into the propriety of the revocation, and would not grant a mandamus to the Lords for payment of the arrears, it being proved that the sum so voted had never come to their hands, and had been newly appropriated by a later act of parliament. *Rex* v. *Lords Commissioners of Treasury. In Re Hand*, 984.

2. To Lords of Treasury to apply to Parliament for grant of allowance.

A party to whom a superannuation allowance has been granted in pursuance of a Treasury minute, according to stat. 50 *G.* 3. *c.* 117., in respect of an office held during pleasure, has no vested interest in such allowance; but the minute may be revoked at will by the Lords of the Treasury.

Although such party contributed to the superannuation fund under stat. 3 *G.* 4. *c.* 113., while the clauses as to such contribution were in force.

Where a Treasury minute had been revoked under the above circumstances, this Court refused a mandamus calling on the Lords of the Treasury to restore such

such minute to their books, and to submit an application to parliament, in the estimates for the current year, for a grant on account of the allowance sanctioned by such minute. *Rex* v. *Lords of Treasury. In Re Smyth*, 976.

3. To Lords of Admiralty to pay deductions from officer's half-pay.

Deductions having been made from a naval officer's half-pay in pursuance of a general order from the Admiralty, application was made on his behalf to have the amount of such deductions restored, and the Lords of the Admiralty stated, in answer, that they had given directions for restoring it. Afterwards they retracted this consent, giving as a reason that it would subject them to many similar applications. After the officer's death, his administratrix moved for a mandamus to the Lords of the Admiralty to restore the deducted sums, on the ground that they had admitted the right to them and the possession of applicable funds.

Held, that there was no vested right in the half-pay, entitling the administratrix to a mandamus. *Ex parte Ricketts*, 999.

4. To public board to carry into effect a contract. *Patent*, II.

5. To Justices to compel payment of church-rate, when their jurisdiction is doubtful.

On application for a mandamus to a justice to enforce payment of a church rate under stat. 53 *G.* 3. *c.* 127. *s.* 7., it appeared that the party assessed had objected to the rate as invalid, in the Consistorial Court, but that the rate had there been confirmed; and that the party, being afterwards summoned before a petty session, repeated his former objection: Held that, the validity of the rate having been questioned in the Ecclesiastical Court, although it did not appear that such question was any longer depending, the jurisdiction of the justices under *s.* 7. of the act was so far doubtful that a mandamus could not issue.

The rate was regular on the face of it; but appeared (by affidavit) to have been voted by the parishioners in vestry for the purpose of meeting past disbursements. Semble, that the rate was not therefore bad, whatever objection might be raised to a retrospective application of the money on passing the churchwarden's accounts. *Rex* v. *Sillifant*, 354.

III. Return to, what it must state.

A mandamus suggested that defendant was surveyor of the highways for a time named, and now expired; and that divers books of accounts, &c., relating to the highways, during his time of office, were now in his possession, and ought to be delivered to the churchwardens, and that he had been often required so to deliver them, and had refused; and the mandamus commanded him to deliver to the churchwardens all books, &c., in his possession, or shew cause to the contrary.

Defendant returned that he had not, on the day of the teste of the mandamus, nor since, nor now, nor when he was required on behalf of the churchwardens, any books, &c., in his possession; not stating whether he had them in his possession between the times of the requisition and the teste, nor what he had done with them:

Held, a good return, but the Court gave the defendant no costs of the mandamus. *Rex* v. *Round*, 139.

IV. Costs of. *Antè*, III.

MANOR.

I. Lord of, whether rateable for payment in lieu of tolls under local act. *Statute*, XLV.

II. In whom bankrupt's estate in customary freehold vested before admittance of assignees.

A., being tenant in fee simple of customary land which passed by bargain and sale with surrender and admittance, became bankrupt, and the commissioners assigned the land to the assignees. Afterwards the bankrupt died; and, after that, the assignees were admitted.

Ejectment being brought, on the demises of the bankrupt's heir-at-law, and of the assignees, both laid between the bankrupt's death and the admission, Held, that the plaintiff must recover on one or the other demise; for that the title was not in abeyance; but, if the assignees' title was not perfect, it was in the heir. *Doe dem. Danson* v. *Parke*, 816.

MARSHAL.

What Court will presume, to sustain allegation on pleadings of defendant being in custody of the Marshal. *Pleading*, IV. 1.

MASTER.

Of *K. B.* When Court will review his report. *Contempt of Court.*

MEMORANDA.

Cottenham, Lord, Chancellor.
Langdale, Lord, Master of the Rolls.

MINERALS.

Demise of; what interest the lessee takes. *Landlord and Tenant*, XI.

MISDIRECTION.

Of Judge at trial, when ground of new trial. *Pleading*, V. 1.

MORTGAGE.

I. What constitutes, under stat. *55 G. 3. c.* 184. *Assumpsit*, II. 2.

When promissory note may be stamped as a mortgage. *Stamp*, II.

III. What mortgagor, and person claiming under him, estopped from setting up as against mortgagee.

1. Defect in his own title.

V. mortgaged land in fee to *O.*; afterwards, and while *V.* remained in possession, *S.*, claiming by a title anterior to the mortgage, brought ejectment against *V.*, and a verdict was taken against him by consent, subject to arbitration as to what lease *S.* should grant to *V.* *S.* granted a lease to *V.* in pursuance of the award made: Held, that *V.* could not set up such lease as an answer to an ejectment brought by *O.* *Doe dem. Ogle* v. *Vickers*, 782.

2. Prior mortgage.

In ejectment by a mortgagee, a defendant, not being the mortgagor, but in reality defending for his benefit, cannot set up a prior mortgage executed by him. *Doe dem. Hurst* v. *Clifton*, 813.

IV. Rights of mortgagee with respect to tenant of mortgagor.

A mortgagee, after default in payment by the mortgagor, has (if he think proper to exercise them) the same rights against a tenant by lease granted before the mortgage, as the mortgagor had, and may take his remedy on such lease, as assignee of the reversion. If the lease was made by the mortgagor subsequently to the mortgage, the mortgagee may treat the tenant as a trespasser, but cannot distrain, or sue for rent, unless he has accepted rent from the tenant, or has given him notice to pay rent, and the tenant has acquiesced.

A deed to lead the uses of a recovery, after reciting that the premises were to be conveyed for the purpose, among others, of securing payment of 800*l.* advanced by *J. H.* to *M. R.*, tenant in tail in remainder, declared the uses as follows:—To *H.* and *L.*, their executors, &c. for 1000 years, to commence from the day before the date, &c., in trust (subject to the powers, &c., after mentioned), upon non-payment of the 800*l.* and interest, to sell or mortgage, and pay that sum to *J. H.*: and, from and after the determination of that term, and subject meantime thereto, and to the trusts thereof, to *E. R.*, mother of *M. R.*, for life: remainder to *T. L.*, his executors, &c., for 2000 years, to commence from the day of the decease of *E. R.*, in trust to levy and repay such sums as *E. R.* should during her life pay to *J. H.* for interest on the 800*l.*, and to suffer the person next in remainder or reversion expectant on the first term to receive the residue of rents not applied in executing the trusts of the latter term: remainder, and in the meantime subject thereto, to such uses as *M. R.* should appoint, and, in default of appointment, to him for life: remainders to his sons and to his daughters in tail: remainders over. A power was then reserved to *E. R.* to demise the premises for ten years from the date of the deed, or seven years from the day of her decease, reserving the best rent, &c.

E. R. demised the premises to a tenant for seven years from the day of her decease, reserving rent "to *M. R.*, or the person for the time being entitled to the freehold or inheritance of the premises immediately expectant" on the decease of *E. R.* She died, and

and the lessee entered. *M. R.* died shortly afterwards, and left a daughter. Afterwards the trustees of the terms of 1000 and 2000 years assigned them to *J. H.*, default having been made in the payment of his 800*l*.

Held, that the seven years' lease granted by *E. R.*, being made under a power created by the deed of uses, must be deemed contemporaneous with the term of 1000 years created by the same deed, and binding on the trustees of that term, who were parties to the deed, so that they could not disturb the possession.

That the trustees of that term, though not "entitled to the freehold or inheritance," were the reversioners entitled to the rent reserved by the lease, and, consequently, that their assignee might destrain for it.

And this, although an ejectment had been brought against the lessee, on the demises, among others, of the last-mentioned trustees (laid previously to their assignment to *J. H.*); there having been no judgment, nor any actual eviction of the lessee.

The Court, after giving the above decisions on a special case, ordered judgment to be entered up for the successful party for half a year's rent. On application of that party in the next term, it appearing, on reference to the special case and postea, that the rule for judgment should have been for a year's rent, and no judgment having yet been entered up, the Court, after cause shewn, amended the rule on payment of costs. *Rogers* v. *Humphreys*, 299.

V. When mortgagor entitled to re-conveyance of mortgaged property under stat. 7 *G.* 2. *c.* 20. *s.* 1.

A mortgagor, in order to entitle himself to the benefit, in a court of law, of stat. 7 *G.* 2. *c.* 20. *s.* 1. (directing a re-conveyance by the mortgagee, plaintiff in ejectment, upon payment of principal, interest, and costs), must become a defendant in the action of ejectment.

Where he is not such defendant, the Court will not interfere, either under the statute, or in the exercise of its general power over actions in the Court.

Although the ejectment has been brought against the tenant of the mortgagor, and the Judge, at the time of the trial, treated the defendant as such tenant, and decided upon the evidence accordingly. *Doe dem. Hurst* v. *Clifton*, 814.

VI. Lease granted under a power given by deed, when it takes effect as against parties to deed. *Antè*, IV.

MUNICIPAL CORPORATION.

See *Corporation.*

NEGLIGENCE.

How far gross negligence differs from mala fides. *Bills of Exchange and Promissory Notes*, IV.

NEW TRIAL.

See *Trial, New.*

NISI PRIUS.

Record, what it must contain. *Practice*, XX.

NONSUIT.

For non-production of document; for what cause set aside.

Plaintiff having been nonsuited for not producing a document on the trial, the Court set aside the nonsuit, on payment of costs, upon the affidavit only of the plaintiff's attorney, that he, the attorney, "as soon as he found that the action was likely to come on," had commenced inquiries to ascertain in whose hands the document was, and, upon discovering this, had immediately (through a person who promised to procure it), made efforts to obtain it, but had obtained it too late for the trial, and now had it. *Atkins* v. *Owen*, 819. (n).

NOTICE.

I. Of action, who entitled to under stat. 5 & 6 *W.* 4. *c.* 59. *Statute*, XL.

II. Of appeal.

1. Against conviction. How far objections, not stated in notice, may be made at trial. *Conviction*, II.
2. Against order of removal. Construction of stat. 4 & 5 *W.* 4. *c.* 76. *ss.* 79. & 81. *Poor*, IX. 1.
3. Against order of Justices for payment

ment of church-rate, to whom to be given. *Rate*, I. 6.

III. Previous to admission of attorney. *Attorney*, I.

IV. To quit; presumption from tenant holding over. *Landlord and Tenant*, IX.

V. Previous to binding of parish apprentice. *Poor*, III. 2.

VI. Of non-payment, to drawer of foreign bill, how to be given. *Bills of Exchange and Promissory Notes*, IV.

VII. Under stat. 6 *G.* 4. *c.* 16. *s.* 82. (Bankrupt Act), what amounts to. *Bankrupt*, I.

VIII. Notice to principal, how far notice to agent. *Bankrupt*, I.

IX. Service of.

1. At house of party in his absence.

(1.) An affidavit of service of notice on a creditor under the compulsory clause of the Lords' Act (32 *G.* 2. *c.* 28. *s.* 16.) is not sufficient if it state merely that the notice was left with the landlady of the house where he lodges; or with a person at the house where he resides, who afterwards stated that she acted as his servant, and had delivered it to him, she herself making no affidavit, and there being no affidavit of belief that the statement of such person was true. *Robinson* v. *Gompertz*, 82.

(2.) To make a rule absolute, on no cause being shewn, it is not sufficient that a deponent should swear to notice of the rule nisi having been left at the dwelling-house of the opposite party, in his absence, with a person who afterwards told the deponent that she had delivered the notice; the deponent must state that he believes this to be true. *Doe dem. Hungate* v. *Roe*, 83. (n).

2. On party for performance of a public duty, how far it may be dispensed with by party. *Corporation*, I.

NUISANCE.

In obstructing navigable river, what amounts to.

On the trial of an indictment for a nuisance in a navigable river and common king's highway, called the harbour of *C.*, by erecting an embankment in the waterway, a finding by the jury that the embankment was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, amounts to a verdict of Guilty.

It is no defence to such an indictment, that, although the work be in some degree a hinderance to navigation, it is advantageous, in a greater degree, to other uses of the port. *Rex* v. *Ward*, 384.

OCCUPATION.

Of tenement, within st. 1 *W.* 4. *c.* 18. *s.* 1., what constitutes. *Poor*, V. 1. (1.).

OFFICER.

Naval, how far he has a vested interest in his half-pay. *Mandamus*, II. 3.

ORDER.

I. Order and disposition of bankrupt, what is within 6 *G.* 4. *c.* 16. *s.* 72. *Vendor and Vendee*, I.

II. Of Judge, when Court will review. *Attorney*, IV.; *Judge*, III. 2.

III. Of Justices, for stopping up highway; what it must state. *Highway*, VII. 3. (2.).

IV. Of removal, acquiesced in, how far conclusive. *Poor*, VI.

OVERSEERS.

I. Power to lease parish property. *Landlord and Tenant*, V.

II. How far entitled to books of surveyor of highways, on his quitting office, *Highway*, VIII. 1.

III. What inferred from designation on pleadings of party being assistant overseer. *Statute*, X. 1. (1.).

IV. Defence under plea of general issue under stat. 43 *Eliz. c.* 2. *Pleading*, V. 1.

OYER.

Time for pleading, after praying oyer. *Practice*, XVI.

PARISH.

Property belonging to.

1. What is evidence of. *Landlord and Tenant*, V.

2. Lease

2. Lease of, by whom to be made. *Landlord and Tenant*, V.

PARISHIONERS.

When competent witnesses in action by churchwardens and overseers. *Landlord and Tenant*, V. 2.

PARLIAMENT.

How far Court will interfere by mandamus to Lords of Treasury.

1. To apply to Parliament for grant of Treasury allowance. *Mandamus*, II. 2.
2. To pay over money received for a party under a vote of Parliament. *Mandamus*, I. 1.

PARTICULARS OF DEMAND.

What plaintiff bound to insert. *Costs*, I.

PATENT.

Construction of.

1. In a declaration for infringing a patent which granted that the plaintiff, and no others, should "*make, use, exercise, and vend*" his invention, and forbade all persons to "make, use, or put in practice" the same, or to counterfeit or imitate it, without the plaintiff's licence, the plaintiff alleged that the defendant without his licence *exposed to sale* articles intended to imitate, and which did imitate, his invention:

Held, on general demurrer, that the count was bad, as not stating anything which was necessarily an infringement of the patent. *Minter* v. *Williams*, 251.

2. A patent for the exclusive use of improvement in the invention of an anchor contained a proviso for avoiding the patent if the patentee should not supply for His Majesty's service all such articles of the invention as should be required, on such reasonable terms as should be settled by the Lords of the Admiralty. The latter used the invention, but did not take the articles from the patentee. The Court refused to issue a mandamus to them to settle the terms according to the patent. *Ex parte Pering*, 949.

PAUPER.

See *Poor*.

PAYMENT.

I. How far delivery of cheque amounts to payment. *Cheque*.

II. Plea of; how far it must allege on what causes of action payment was made. *Pleading*, V. 5.

PENALTY.

How to be awarded in a conviction. *Conviction*, I.

PENSION.

Legal right of party to claim allowance received for him by Lords of Treasury under a vote of Parliament. *Mandamus*, I. 1.; and see *Mandamus* II., 1—3.

PLEADING.

I. Form of action.

1. Recovery of money extorted under colour of legal process.

Plaintiff being a foreigner, ignorant of the *English* language, was arrested at *Falmouth* soon after his first arrival there from abroad, by defendant for 10,000*l*. Defendant and plaintiff then signed an agreement, by which, in consideration of 500*l*. paid by plaintiff to defendant, plaintiff was to be discharged, and not to be again arrested; and plaintiff was to put in bail in twelve days; the 500*l*. was to be "as a payment in part of the writ;" and both parties were to abide the event of the action; the agreement containing no provision for refunding the money if the action should fail. Plaintiff paid the 500*l*. and was released. No bail was put in; and the writ was afterwards set aside for irregularity. Plaintiff then sued defendant for the 500*l*. as money had and received; and the jury found that defendant knew that he had no claim upon plaintiff:

Held, that the action lay, the payment having been made under the compulsion of colourable legal process. *Duke de Cadaval* v. *Collins*, 858.

2. Against magistrate for commitment under irregular conviction. *Conviction*, I.

3. What

3. What averment shews plaintiff entitled to bring action under st. 17 *G.* 2. *c.* 3. *Statute*, X. 1. (1.).

4. Bill of exchange in the hands of a tortious holder, how recoverable. *Bills of Exchange and Promissory Notes*, IX.

5. Assumpsit.

(1.) What implied contract arises from covenants of lease on tenant holding over. *Landlord and Tenant*, VI.

(2.) For what breaches of contract maintainable by reversioner against tenant. *Landlord and Tenant*, VI.

(3.) Use and occupation.

[1.] Who may maintain. *Post*, II.

[2.] In respect of what maintainable by landlord against tenant. *Landlord and Tenant*, XI.

(4.) Money had and received.

[1.] What constitutes. *Assumpsit*, II. 2.

[2.] To recover proceeds of an illegal execution.

An insolvent debtor executed a warrant of attorney, on which judgment was signed, and he afterwards went to prison. Subsequently his goods were seized and sold under a fi. fa. on the judgment, and the proceeds were paid to the judgment creditors. The insolvent petitioned, and his effects were assigned under the Insolvent Debtors' Act, 7 *G.* 3. *c.* 57.:

Held, that the assignee might recover the proceeds of the sale from the judgment creditors, as money had and received to the use of the assignee after the subscribing of the petition, on section 34. of the act. *Gye* v. *Hitchcock*, 84.

6. Trover.

(1.) For what maintainable by tenant at expiration of his tenancy. *Landlord and Tenant*, XII.

(2.) To recover bill in hands of tortious holder. *Bills of Exchange and Promissory Notes*, IX.

II. Parties to action.

How far plaintiffs must have community of interest in subject matter of action.

A., *B.*, and *C.*, being interested in certain lands, but having no common legal interest in any portion of them, agreed together to put them up for sale, according to their respective interests, and the lands were so put up, under the direction of their agent, in lots. Each lot was described in a separate paper, containing the conditions of sale, in which it was stipulated that "the vendors" should deliver an abstract of title; that the conveyances should be executed, and the whole purchase money paid, on a certain day, from which time the purchaser should have possession; and that, if the purchaser should be let in before payment of the purchase money, he should be considered tenant at will to the vendors, and pay interest at the rate of 4 per cent. on the amount of purchase money, as and for rent. Defendant bought four of the lots under the above conditions, two by auction and two by private contract. No abstract of title was delivered; but defendant was let into possession, and held for several years, not paying the purchase money. He knew of the arrangement entered into by *A.*, *B.*, and *C.* for the sale of the premises:

Held, that *A.*, *B.*, and *C.* could not jointly sue upon an implied contract by the defendant to waive the delivery of an abstract, and perform the condition for payment of 4 per cent. interest as rent.

Also, that *A.*, *B.*, and *C.* could not recover the 4 per cent. in a joint action for use and occupation. *Seaton* v. *Booth*, 528.

III. Commencement of action.

After delivery of cheque for money sought to be recovered.

(Per *Littledale* J.) a party to whom a cheque is sent may commence an action before he sends it back. *Hough* v. *May*, 954. (See whole placitum *Cheque*.)

IV. Declaration.

1. Informal, from not pursuing rules of Court, how to be taken advantage of.

A declaration in *K. B.* beginning in the old form, "*A.* complains of *B.* being in the custody of the Marshal," &c., is not on that account specially demurrable since the act 2 *W.* 4. *c.* 39. and the Rules of *Mich.* 3 *W.* 4. For the

the Court will not presume that the action was not commenced in the Palace Court, and the defendant actually in custody of the Marshal, in which case the declaration would be correct, the act and rules not applying to causes removed from inferior courts.

If the defendant wishes to object to such a declaration in a suit commenced in a superior court, he should not demur, but move to set aside the declaration for irregularity. *Dod* v. *Grant*, 485.

2. Assumpsit.

New assignment: effect of on the issue.

In assumpsit for money lent, payment was pleaded; the plaintiff new assigned, and non assumpsit was rejoined. The plaintiff, at the trial, claimed 15*l.* for money lent in *August* 1833, and proved an acknowledgment by the defendant after that time, that he owed the plaintiff 15*l.* The defendant gave evidence of his having paid the plaintiff 15*l.* in *October* 1833. The under-sheriff, in summing up, stated the question for the jury to be, whether or not the 15*l.*, said to have been lent in *August* 1833, had been so lent. The plaintiff had a verdict. On motion for a new trial, or to enter a verdict for the defendant:

Held, that the proper question for the jury was, whether or not there had been two debts; that the defendant was not precluded from taking this point by the evidence of payment which he had produced at the trial; and that, there having been some evidence of a second debt, a new trial must be had. *Hall* v. *Middleton*, 107.

3. Debt; for penalty on statute 17 *G.* 2. *c.* 3.

What must be stated in declaration. *Statute*, X., 1. (1.).

V. Plea.

1. General issue; defence under, when not affected by new rules of pleading.

Under stat. 3 & 4 *W.* 4. *c.* 42. *s.* 1. (which provides that the contemplated rules of pleading shall not disable any person from pleading the general issue and giving the special matter in evidence, where by statute he may now do so), an overseer, sued in trespass for taking *A.*'s goods, may still prove, on plea of Not Guilty, that he, as overseer distrained the goods for a poor's rate due from *B.*, and that they were *B.*'s not *A.*'s. The general issue does not, under the rules of *Hil.* 4 *W.* 4., confine him to proof of his character of overseer.

The practice of not granting a new trial on the ground that the verdict was against evidence, if the amount claimed fall short of 20*l.*, applies to motions made by plaintiff, as well as motions by defendant.

But where the ground is misdirection, the amount is not regarded. And, where the Judge had misdirected the jury by submitting for their consideration a fact not proved nor deducible from the evidence, the Court granted a new trial, though the amount in question was less than 1*l.* *Haine* v. *Davey*, 892.

2. Payment.

(1). How far supported by proof of delivery and acceptance of cheque. *Cheque.*

(2). How far it must allege on what causes of action payment was made. *Post*, 5.

3. Statute of Limitations; how to be pleaded.

A plea that the "supposed debt, if any such there be," did not accrue within six years, is bad on special demurrer, for not confessing the debt. *Margetts* v. *Bays*, 489.

4. Set off.

Amount shewn on face of pleadings, how far material. *Post*, 5.

5. How far plea may identify causes of action alleged in different counts of declaration.

Declaration, that defendant was indebted to plaintiff in 200*l.* for work and labour, 200*l.* for money paid, and 200*l.* on an account stated; in consideration whereof defendant promised to pay the said several monies; breach, non-payment; damages 200*l.*

Plea, as to 20*l.*, parcel of 56*l.* 11*s.* 8*d.*, parcel of the monies in the first two counts mentioned, and as to 20*l.*, parcel of 56*l.* 11*s.* 8*d.*, parcel of the money in the last count mentioned, that the said 20*l.* so found due on an account stated was the same sum of 20*l.*, parcel of the monies in the first two counts mentioned;

tioned; and that the said two sums of 20*l.* each were one and the same debt of 20*l.*, and not other and different debts of 20*l.*; and that defendant paid, and plaintiff accepted, 20*l.*, in satisfaction of the promises, so far as they related to the same debt of 20*l.*, and of all damages sustained by reason of the non-performance: Held, on special demurrer,

That the identity might be so averred:

That the plea was bad, for not shewing to how much of the sum in the first count, and to how much of the sum in the second, it was pleaded.

Defendant also pleaded, as to certain portions of the sums named in the different counts, amounting in all, on the face of the plea, to 114*l.* 14*s.* 8*d.*, a set off of 57*l.* 7*s.* 4*d.*; and that that sum equalled the damages sustained by the non-performance of the promises, so far as they related to the sums to which that plea was pleaded: Held, on special demurrer,

That the plea was bad for pleading a smaller claim as an answer to a larger. *Mee* v. *Tomlinson*, 262.

6. How insufficiency of averment to be taken advantage of. *Post*, XI.

7. Not guilty, in action of libel, what it puts in issue. *Libel*, II.

8. Bona fides, how far a justification of libel. *Libel*, I.

9. Prohibition: power to plead several pleas.

Since the statute 1 *W.* 4. *c.* 21. *s.* 1. several pleas may be pleaded in prohibition, as in common actions between subjects. *Hall* v. *Maule*, 283.

10. Scire facias.

Matters which might have been pleaded to original action.

To scire facias upon a judgment in assumpsit, by the original plaintiff, defendant pleaded plaintiff's bankruptcy, assignment, &c.; and that the causes of action in the original suit accrued before plaintiff became bankrupt. On special demurrer, for that the plea did not shew whether the judgment was recovered before or after the bankruptcy: Held, that the plea was bad, inasmuch as it did not appear but that the bankruptcy might have been pleaded in bar of the original action. *Bayliss* v. *Hayward*, 256.

VI. Replication.

To a plea of twenty or forty years' enjoyment under stat. 2 & 3 *W.* 4. *c.* 71., how licence shall be pleaded.

The words "enjoyed by any person *claiming right*" applied to easements, in stat. 2 & 3 *W.* 4. *c.* 71. *s.* 2., and "enjoyment thereof *as of right*" in *s.* 5., mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or on many; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall be strictly legal, as by prescription and adverse user, or by deed, or shall have been merely lawful so far as to excuse a trespass.

To a plea of forty or twenty years' enjoyment of a way, a licence, if it cover the whole time, must be pleaded. But a parol or other licence, given and acted on *during* the forty or twenty years, may be proved under a general traverse of the enjoyment *as of right*: and this, whether such licence be granted for a single time of using, or for a definite period.

Semble, that, where issue is joined on the allegation of an interruption acquiesced in, the party alleging the interruption, having proved a non-user during part of the time, may, in order to shew that such non-user was not a voluntary forbearance, give evidence that, two years before the non-user commenced, the party claiming the way paid a consideration for being allowed to use it. *Tickle* v. *Brown*, 369.

VII. Similiter.

Want of on pleadings, its effect. *Similiter*.

VIII. Judgment.

1. What will be presumed after verdict.

On motion for costs under 43 *G.* 3. *c.* 46. *s.* 3, (the plaintiff having arrested for 35*l.* and recovered only 19*l.*) affidavits were put in for the plaintiff, sworn by himself and others, contradicting the evidence given at the trial for the defendant, and impeaching the credit

credit and competency of his principal witness. No motion had been made by the plaintiff for a new trial or to increase the damages.

Held that the verdict was primâ facie evidence of the want of cause for arresting; and that the Court could not try, upon affidavit, whether or not such verdict was well founded. *Tipton* v. *Gardner*, 317.

2. Non obstante veredicto, when it may be.

Three pleas were pleaded in bar to a declaration in trespass containing one count, and issues joined on them. By order of Nisi Prius, a verdict was taken for 100*l.* damages, subject to the award of a barrister, to whom the cause and all matters in difference were referred, with power to direct what should be done by the parties. He directed a verdict for the plaintiff on two issues, and for the defendant on the third, adding that, if there had not been the third issue, he should have awarded 1*s.* damages to the plaintiff on the other issues:

Held, that it was not competent to the plaintiff to move for judgment non obstante veredicto on the third issue.

And this without reference to any special clause in the order of reference, restraining the parties from bringing a writ of error, &c. *Steeple* v. *Bonsall*, 950.

IX Highway assessment, how to be pleaded.

In pleading a surveyor's assessment, made on occupiers of lands, under stat. 13 *G. 3. c.* 78. sects. 30. and 45.. it is necessary to aver that the assessment did not exceed 9*d.* in the pound *on the yearly value of the lands;* although the limitation as to value annexed to sects. 30. and 45. is contained in a distinct proviso; and although the form of an order of justices in Schedule No. 15. of the act, adapted to the above sections, makes no mention of yearly value. *Morell* v. *Harvey*, 684.

X. Traverse with inducement, what it admits. *Evidence*, XV. 3.

XI. What averments sufficiently identify parties named on pleadings.

Declaration stated that *S.* drew a bill, payable to his own order, on *W.*; that "the said *S.*" indorsed to defendant, who indorsed to "the said *S.*," who indorsed to plaintiff; and that *W.* did not pay, of which defendant had notice. Plea, that, after the dishonour, plaintiff, without defendant's authority, took from "the said *S.*" a cognovit in an action commenced by plaintiff against *S.* for the recovery of the sum specified in the bill, and, by the cognovit, agreed to give, and did without defendant's authority actually give, to *S.* longer time for payment than the time in which plaintiff might have obtained judgment against *S.*: Held that, upon this declaration, it must be intended that the person to whom defendant indorsed was, and was known by plaintiff to be, the person who indorsed to defendant; and that the plea, therefore, was sufficient, though it did not state in what character *S.* had been sued by plaintiff, the action against defendant being in any case a fraud on the cognovit.

Held also that, upon general demurrer, the plea was good, though it did not allege the cognovit to have been taken before the action commenced, and was pleaded in bar of the action generally, and not in bar of its further maintenance. *Hall* v. *Cole*, 577.

XII. What may be given in evidence on issue of rien in arrear.

To a declaration for an excessive distress for rent, defendant pleaded that the whole sum distrained for was due and in arrear, concluding to the country, on which plaintiff joined issue: Held that, on this issue, defendant was not precluded from insisting on certain arrears, by the fact that, since they became due, other arrears had become due and had been distrained for. And this, although, on the first distress, the warrant and notice stated the distress to be for rent due up to a day named, being subsequent to those on which the arrears now in question accrued; and although, on the second distress, the defendant stated that it was for rent due since the last distress. *Gambrell* v. *Earl of Falmouth*, 73.

XIII. Variance between pleading and evidence.

1. Supplying omissions in bond. *Bond*, I.
2. Description of highway by termini. *Highway*, III.

XIV. Criminal.

1. Indictment.

Venue how far conclusive as to place of trial. *Venue.*

2. Conviction.

Penalty how to be awarded against several. *Conviction*, I.

POLICY.

Of insurance. See *Insurance.*

POOR.

I. Rate.

1. Profits of navigation, how to be rated.

By a local act, the soil of a river was vested in trustees of a navigation, who were to receive the profits of such navigation, and apply them in the first instance in repairs and amendments, and in keeping the river navigable, &c. By the same act, confirming certain articles of agreement, it was provided that *M.* should receive, out of the profits of the said navigation, so much for every ton, &c. navigated on the river, and that *D.* should receive so much for every ton navigated on the said river within his own land situate in the parish of *S.*; and that the trustees should pay to the persons to whom any shares of the profits should be allotted, in the manner provided by the act, such respective shares yearly, after deducting the costs of repairing and amending the premises, and executing the trusts. Satisfaction for damage to lands, &c., by cutting passages or heightening the waters, was to be paid by the trustees out of the profits of the navigation, before the persons entitled to shares of the profits should receive such shares.

Tolls were taken as follows: — On vessels using the whole line of the navigation, 4*s.* Between a certain point above the parish of *W.*, and the beginning of *W.*, 3*s.* From the beginning to the end of *W.* (and to a point below), 2*s.* 6*d.* From thence to the lower end of the navigation, 2*s.*: Held,

(1.) That the poor-rate payable by the trustees for the part of the navigation in *W.* was to be estimated, not by the increase of toll taken within *W.*, but by a mileage calculation, the gross amount of toll upon any voyage including *W.* being distributed evenly over the line travelled, and the amount payable by *W.* being calculated by the proportion which the length of navigation in *W.* bore to the whole of the line travelled, whether the voyage extended over the whole length of navigation, or a part of it, including *W.*

(2.) The expense of repairs being equal through the whole line, that the amount of such repairs was to be deducted on a like mileage calculation.

(3.) That, in estimating the rateable profits, the compensations to *M.* and others were not to be deducted. And this, even in the instance of compensation for injury to a mill situate within the parish of *W.*

(4.) Also (on the assumption that lands in *W.* were rated at rack-rent and no more), that ten per cent. was to be deducted from the rateable amount, for the tenant's profit. *Rex* v *Woking*, 40.

2. Inspection of, under statute 17 *G* 2. *c.* 3. *Statute*, X. 1. (1.)

II. Maintenance.

Expenses of pauper after suspended order.

A pauper settled in *O.* met with an accident while resident in *M.*, which made him chargeable, and was relieved by *M.* The pauper being incapable of removal in consequence of the accident, an order of removal to *O.* was made, and immediately suspended: Held that, under stat. 35 *G.* 3. *c.* 101. *s.* 2., *O.* was liable to the expenses incurred by *M.* after the order. *Rex* v. *Oldland*, 929.

III. Settlement by apprenticeship.

1. Premium to be stated in indenture.

Pauper was bound apprentice by an indenture, which stated that 10*l.* had been paid to the mistress as a consideration, out of the funds of a charity. The mistress had agreed with *D.*, the pauper's grandmother (who was no party to the indenture), to take the apprentice for 25*l.*, which *D.* was to pay. The 10*l.* was paid as part of the 25*l.* out of the charity funds; but the mistress, at the time of making the agreement, did not know that this was intended. It did not appear that the trustees of the charity knew of any payment contemplated or made, except that of 10*l.*: Held, that the indenture was void under stat. 8 *Ann. c.* 9. *s.* 39., for not truly stating the sum paid or contracted

contracted for with the apprentice. *Rex* v. *Amersham*, 508.

2. Notice previous to binding parish apprentice.

(1.) How far necessary.

Under stat. *56 G. 3. c.* 139. sects. 1. 2., when an apprentice is bound from one parish into another, the indenture is not valid for the purpose of settlement, unless notice has been given to the overseers of the latter parish, pursuant to sect. 2., before the indenture was allowed.

But, on appeal against an order of removal grounded on such indenture, the respondents are not bound in the first instance to prove such notice: if there be no evidence to the contrary, the notice will be presumed. *Rex* v. *Whiston*, 607.

(2.) When proof of necessary on appeal. *Antè*, (1).

3. Execution of indenture.

A printed indenture of apprenticeship executed on one day, but bearing date on another, is not void by statutes *8 Ann. c.* 9. and *5 G. 3. c.* 46.; and a settlement may be gained by service under it. *Rex* v. *Harrington*, 618.

4. Imperfect contract of apprenticeship.

(1.) The sessions quashed an order of removal, which assumed an imperfect contract of apprenticeship; and they stated the following facts for the Court. Pauper's brother worked with *W.*, a carpenter, as apprentice, under a verbal contract; on his leaving *W.*, he applied for pauper to be taken in his place. *W.* said he would take no more apprentices unless they would agree to work on his land, *as well* as at the carpentry business, saying, "I will have no more apprentices, unless he is agreeable to do other work as well: I will take him to do work as a servant." *W.* occupied three or four acres of hop ground. It was agreed that pauper should live with *W.* three years, to learn the business of a carpenter, and to do any other work *W.* required; pauper to have *9s.* a week the first year, *10s.* the second, *11s.* the third, and to be paid for over work at the same rates. He entered into *W.*'s service in pursuance of the agreement, boarding and lodging at his own expense. The question for the Court was stated to be, whether the pauper acquired a settlement by living with *W.* under these circumstances; if so, the order of sessions to be confirmed; if not, to be quashed.

This Court quashed the order of sessions. *Rex* v. *Ightham*, 937.

(2.) Pauper's mother applied to *W.* a carpet weaver, to take him into his employment. *W.* agreed with her to take pauper for two years on trial, after which, if *W.* and pauper agreed, he was to be apprenticed to *W.* He was to have board, lodging, and washing, but no stated wages, and he was "to draw." Every carpet weaver is at first taught "drawing." Pauper served above a year under this contract, in the borough of *K.* These facts being proved on appeal against an order removing pauper to *K.*, the chairman put it to the sessions, whether there had been a hiring and service, or a service under an imperfect contract of apprenticeship. They found the latter, but sent a case for the opinion of this Court, stating the facts as above.

Held, that this Court might, under these circumstances, review the judgment of the sessions.

But that the judgment was not to be disturbed, there being grounds for the finding.

And semble, that the finding was right, inasmuch as it might be collected from the case that the object of the parties was learning and teaching. *Rex* v. *Wishford*, 216.

IV. Settlement by hiring and service.

What constitutes a hiring and service.

By the regulations of a bridewell, the turnkeys were to be appointed by the keeper, but the appointment was subject to the approbation and confirmation of the visiting justices. The keeper might suspend, but not permanently displace them without the authority of the visiting justices. They were to receive their salaries from the county treasurer, but in all other respects to be under the immediate orders and control of the keeper:

Held, that an appointment to the place of turnkey, and discharge of its duties under the above regulations at a yearly salary, did not constitute a hiring and service, by which a settlement could be gained. *Rex* v. *Sparsholt*, 491.

V. Settlement by renting a tenement.

1. What constitutes occupation and payment of rent.

(1.) Pauper rented a house at 24*l.* a year, which he paid, and resided in the house with his family. He was in the habit of taking in persons to sleep in some of the rooms, letting sometimes a bed, sometimes half a bed, generally by the night, but occasionally for a week, in which case, however, the bed only was let, and the pauper reserved the right of putting another bed into the room. The lodgers had no right to the rooms by day. The pauper had constant access to, and control over, the whole house, and kept the keys of all the rooms:

Held, an actual occupation of the dwelling-house, within stat. 1 *W.* 4. *c.* 18. *s.* 1. *Rex* v. *St. Giles-in-the Fields*, 495.

(2.) Pauper hired a house and lands, from *Michaelmas* 1832, to *Michaelmas* 1833, for 30*l.*, and entered into occupation at *Michaelmas* 1832. In *July* 1833, he assigned to *W.* all his debts, securities, stock, effects, utensils in trade, household goods, furniture, crops growing or severed, implements of husbandry, cattle, live and dead stock, and all other personal estate and effects, to have, hold, and take the said monies, &c., live and dead stock, and all other the premises assigned, to *W.*, on trust to cultivate the lands as long as the crops then growing should remain, and to sell the stock, crops, &c., and receive the amount of the valuation to be made as between outgoing and incoming tenant at quitting the land; and *W.* was to be possessed of the monies on trust, first, to pay costs and charges, next to pay the rent, taxes, &c., which were or should be due during the continuance of the trusts, and next to pay creditors of the pauper, parties to the deed. In *August* 1833, *W.* sold the stock, effects, and crops, which were cut and carried away by the purchasers; and afterwards *W.* paid the rent for the year, out of the produce of the property assigned. Pauper, by himself or family, occupied the house till *Michaelmas* 1833.

Held, that there was neither an undivided occupation for the year, nor a payment of rent by the pauper, to satisfy stat. 1 *W.* 4. *c.* 18. *s.* 1.; and that no settlement was gained. *Rex* v. *Pakefield*, 612.

2. Completion of settlement after order of removal.

Pauper hired a house in *W.* at 17*l.* per annum, for a year, (1832, 1833), and resided in it, and occupied it for a year. After the expiration of the year, while some rent was unpaid, he was removed to *B.* The order was appealed against. Pending the appeal, the pauper returned to *W.*, resided in the house from the 7th of *December* 1833, to the 27th of *January* 1834, and paid the arrear of rent due for the expired year. On the 1st of *January*, the order of removal was, upon the appeal, confirmed on the merits:

Held, that the pauper gained a settlement at the time of the payment of the arrear, and that the confirmation of the order of removal shewed only that he had not completed a settlement at the time of the order. *Rex* v. *Willoughby*, 143.

VI. Effect of division of parish into districts upon settlement.

A pauper was removed by order of justices to the parish of *H.* (so named in the order), which consisted of several townships, maintaining their poor jointly. The order was acquiesced in. Afterwards one of the townships, *O.*, separated itself from the parish, under stat. 13 & 14 *Car.* 2. *c.* 12. *s.* 21., and from thenceforth maintained its own poor. The pauper was subsequently removed to the township of *O.* (so named in the order of removal) from the parish of *W.* On appeal against the order (the respondents having put in the order of removal to *H.*), *O.* offered evidence that the pauper was not settled in that particular township, before its separation from *H.* The sessions rejected the evidence.

Held, *Patteson* J. dubitante, that the former order upon *H.* was not conclusive against *O.* on appeal against an order directed to *O.* as a distinct township; and the case was sent back to be reheard. *Rex* v. *Oldbury*, 167.

VII. What constitutes "a coming to inhabit" within stat. 13 & 14 *Car.* 2.

On a case sent up by sessions, it was stated that the pauper, not being resident at the parish of *W.*, was charged by

by a woman living there with having gotten her with child, and was committed to the county jail at *B.* for want of sureties; that the woman's father became his surety, and took lodgings for him at *W.*, to which the pauper removed, and after residing there a week, married the woman, became chargeable in about a week after his marriage, and was removed from *W.* to *H.* The lodgings were paid for by the woman's father. The case then stated that, on the hearing of the appeal against the order of removal, the respondents offered to prove that the pauper was settled in *H.*, but that "the sessions quashed the order, on the ground that the pauper had not come to inhabit in *W.* within the meaning of stat. 13 & 14 *Car.* 2."

Held, by *Patteson* and *Williams* Js., that, upon this statement, it sufficiently appeared to this Court that the pauper was removable; and the order of sessions was quashed, and the case sent back to be reheard:

Absente Lord *Denman* C. J.; and dissentiente *Coleridge* J., on the ground that the sessions had negatived the existence of an intention within the statute, and were not necessarily wrong as to the fact. *Rex* v. *Woolpit*, 205.

VIII. Removal.

Of Irish pauper under stat. 3 & 4 *W.* 4. *c.* 40.

A pauper, born in *M.* in *England*, not having done any act to gain a settlement in her own right, and being the daughter of *Irish* parents, who had gained no settlement in *England*, was, at the age of eighteen, delivered of a bastard, in her father's house in *S.*, in *England*, where she resided as part of his family. The mother of the pauper having applied to *S.* for relief for the pauper and her bastard only:

Held that, under stat. 3 & 4 *W.* 4. *c.* 40. *s.* 2., the pauper was removeable to *Ireland*, and not to *M.*; and that stat. 4 & 5 *W.* 4. *c.* 76. (assuming that it defines the age of emancipation to be sixteen, and prevents the head of a family from becoming chargeable by relief given to a child after that age) was not applicable, inasmuch as it extends only to *English* and *Welsh* poor. *Rex* v. *Mile End Old Town*, 196.

IX. Appeal against order of removal.

1. What notice to be given.

The act for amendment of the Poor Law, 4 & 5 *W.* 4. *c.* 76., does not, in sects. 79. and 81., alter the existing practice of sessions as to the time for giving notice of appeal against orders of removal. It is not necessary, by sect. 79. that notice of appeal should be given within twenty-one days after the notice of removal thereby required; nor, by sect. 81., that notice of appeal should be given fourteen days at least before the sessions.

The statement of the grounds of appeal, required by sect. 81, may be delivered before the notice of appeal. And, if delivered with an erroneous notice of appeal, it is nevertheless available, if a good notice of appeal, incorporating such statement by reference, be afterwards served in proper time. *Rex* v. *Suffolk*, 319.

2. Grounds of appeal, when to be given. *Antè*, I.

X. Effect of order of removal unappealed against. *Antè*, VI.

XI. Overseers.

Power to lease parish property. *Landlord and Tenant*, V.

See further, *Overseers*.

POWER.

I. Execution of; what a sufficient attestation.

Lands were limited to such uses, &c. as *L.* should appoint by her last will and testament in writing, to be by her *signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses.* *L.* signed and sealed an instrument, containing an appointment, commencing thus:—"I, *L.*, do publish and declare this to be my last will and testament;" and ending thus:—"I declare this only to be my last will and testament. In witness whereof, I have to this my last will and testament set my hand and seal the 12th day, &c." The attestation was as follows:—"Witness *C. B.*, *E. B.*, *A. B.*:" Held, a good execution of the power, on the face of the instrument.

The will being more than thirty years old: Held that, on production of it in the above form, the fact of the attestation was sufficiently proved, though

one witness was still alive and was not called.

Quære, Whether in general publication be essential to the validity of a will? *Doe dem. Spilsbury* v. *Burdett*, 1.

II. Lease granted under a power given by deed, when it takes effect as against parties to the deed. *Mortgage*, IV.

PRACTICE.

I. Amendment of rule for judgment. *Mortgage*, IV.

II. Bail.

What must be stated in affidavit to hold to bail.

An affidavit to hold to bail, stating the defendant to be indebted to the plaintiff for money had and received by defendant for and on account of plaintiff and at his request, but not adding that it was received to plaintiff's use, is insufficient. *Kelly* v. *Curzon*, 622.

III. Certiorari.

Recognizances previous to removal of indictment. *Certiorari*, IV.

IV. Consolidation of actions. *Consolidation.*

V. Costs.

1. Of amendment of rule for judgment. *Mortgage*, IV.
2. Defendant's costs in ejectment, how enforced. *Ejectment*, IV.
3. Of different issues in a cause. *Costs*, I. 3 (2).
4. Under interpleader rule. *Interpleader*, II.

VI. Criminal information.

On application of person who has taken out warrant against party. *Information, Criminal*, I.

VII. Ejectment.

1. Stay of proceedings in second action until payment of costs in a former one. *Ejectment*, IV.
2. Entry of verdict on second demise after execution on first. *Ejectment*, III.
3. Striking out names of lessors of plaintiff at instance of defendant. *Ejectment*, II.

VIII. Execution.

1. Discharge out of custody.

(1). For debt under 20*l.*, who entitled to. *Execution*, 2.

(2). For irregularity when it may be.

[1.] A defendant who is arrested on the 10th of *June* on a ca. sa., which does not comply with the rule of Court, *Hil.* 2 & 3 *G.* 4. (requiring the place of defendant's abode, &c. to be indorsed), is too late in applying to the Court in *Michaelmas* term following, to be discharged on the ground of irregularity; although he swears that he was not aware of the irregularity until the time when he made the application. *Tarber* v. *French*, 362.

[2.] If a defendant be taken in execution upon a ca. sa., sued out more than a year and a day after the judgment, without a scire facias, he may be discharged at any distance of time, and does not waive the objection, however long he may remain in custody. *Mortimer* v. *Piggott*, 365. (n).

2. When execution creditor compelled to indemnify sheriff. *Sheriff*, VI.

IX. Irregularity; in pleadings, by not complying with rules of Court, how to be taken advantage of. *Pleading* IV.

X. Judgment.

1. Entry of; what will be presumed after verdict. *Statute*, XLII.
2. Entry of, nunc pro tunc.

Under the rules *Hil.* 4 *W.* 4. (*General Rules and Regulations*, 3), where plaintiff has obtained a verdict, but defendant has obtained a rule nisi for a new trial, which after the lapse of a year has been discharged, and in the meantime defendant has died, the Court will order judgment to be entered nunc pro tunc, though more than two terms have elapsed since the discharge of the rule, if it appear that the delay was occasioned by taxation of costs, and no fault be specifically imputed to the plaintiff. *Blewett* v. *Tregonning*, 1002.

3. Non obstante veredicto, when it may be. *Pleading*, VIII. 2.
4. On criminal conviction, while action pending. *Judgment*, III.

XI. Juror; withdrawal of, on trial.

Right of plaintiff to bring another action.

On a trial in the Exchequer, a juror was withdrawn by consent. Afterwards plaintiff sued defendant in this

this Court for the same cause of action. This Court stayed the proceedings as being contrary to good faith.

Although the plaintiff, who had conducted the first cause for himself, and was not a lawyer, deposed that he did not know that the arrangement would debar him from bringing a second action. *Moscati* v. *Lawson*, 331.

XII. New trial.
1. On improper admission of evidence. *Trial, New*, I.
2. For misdirection of Judge and verdict against evidence. *Pleading*, V.

XIII. Nonsuit.
Setting aside an affidavit. *Nonsuit.*

XIV. Notice.
Service of, at house of party in his absence. *Notice*, IX.

XV. Particulars of demand.
What plaintiff bound to insert. *Costs*, I.

XVI. Pleading, time for, after praying oyer.

If a defendant obtains an order calling on plaintiff to give security for costs, and directing that defendant shall have seven days to plead after such security given, and defendant afterwards, and before security given, craves oyer, the time for pleading runs from the day when oyer is granted, if subsequent to the giving of security or rescinding of the order, and not, in that case, from the time when such security is given or order rescinded. *Cahill* v. *Macdonald*, 1004.

XVII. Process.
Setting aside for irregularity: power of Judge at chambers. *Judge*, III. 2.

XVIII. Prohibition.
To ecclesiastical Court, when granted. *Prohibition*, I.

XIX. Quo Warranto.
Application for. *Quo Warranto.*

XX. Record.
Of nisi prius, what it must contain.

Since the rule (*Hil.* 4 *W.* 4.) that the entry of proceedings on the record for trial, or on the judgment roll, shall be taken to be, and shall be, the first entry of the proceedings upon record, it is not necessary to enter upon the nisi prius record a plea in abatement and judgment of respondeat ouster thereupon. *Pepper* v. *Whalley*, 90.

XXI. Sheriff.
When Court will interfere for his protection. *Sheriff*, VI.

XXII. Similiter.
Want of, when cured. *Similiter.*

XXIII. Stay of proceedings.
When Court will interfere to enforce equitable claim.

A. gave a promissory note to *B.* and *C.* jointly, for money lent to him, one half by each. *B.* died, and *A.* took out administration, with the will annexed, to her effects. *C.* sued him on the note. *C.* was a legatee, and was charged by *A.* which having goods of the testatrix in her hands. On motion to stay proceedings in the action, upon *A.* paying half the principal and interest of the note into Court, and giving *C.* a discharge for the residue:

Held, that the case was not one in which this Court, by virtue of its equitable jurisdiction, could interfere. *Barlow* v. *Leeds*, 66.

XXIV. Taxation.
1. Of Attorney's bill. *Attorney*, IV.
2. Of costs: power of Court over. *Costs*, I.

XXV. Verdict.
1. In ejectment. See *Ejectment*, III.
2. Discharging jury from giving verdict. *Verdict*, II.
3. What will be presumed after verdict. *Pleading*, VIII. 1. *Statute*, XLII.

PRESCRIPTION.

Enjoyment of right of way for 20 or 40 years under st. 2 & 3 *W.* 4. *c.* 71.: pleading and evidence relating to. See *Pleading*, VI.; *Evidence*, IX. 2.

PRESUMPTION.

I. Of cause of action, after verdict. *Pleading*, VIII. 1.

II. Of notice previous to binding of parish apprentice, after service under indenture. *Poor*, III. 2.

III. Of proper stamp, on instrument not produced. *Assumpsit*, II. 2.

PRINCIPAL AND AGENT.

I. How far auctioneer agent of vendor and vendee. *Vendor and Vendee*, IV.

II. Notice to principal, how far notice to agent. *Bankrupt*, I.

III. How far Bank of England identified with transactions of branch banks. *Bankrupt*, I.

PRISONER.

In civil execution, discharge of. *Practice*, VIII. 1.; *Execution*, II.

PROCESS.

Setting aside for irregularity: power of Judge at chambers. *Judge*, III. 2.

PROHIBITION.

I. To Ecclesiastical Court, to stay proceedings for enforcing church-rate.

Stat. *53 G. 3. c. 127. s. 7.*, which gives power to a justice to enforce the payment of a sum under 10*l.* due upon a church-rate, where the validity of the rate has not been questioned, nor the liability of the party, takes away the jurisdiction of the Ecclesiastical Court in such cases.

But, if the validity or liability be in question, the Ecclesiastical Courts have jurisdiction, though the party has not been summoned before a justice.

Therefore, where a party, not having been summoned before a justice, was libelled in the Consistory Court for a sum which, on the face of the proceedings, was less than 10*l.*, due upon a church-rate, and sentence was given against him, this Court refused to grant a prohibition, upon the ground that the validity of the rate was questioned in the proceedings in the Ecclesiastical Courts.

And afterwards it appearing, by more particular reference to the pleadings themselves, that they did not disclose whether or not the validity was questioned, this Court held that that circumstance alone did not authorise it to issue a prohibition.

Semble, that the Consistory Court of the Bishop, the Court of Arches, and the Court of Delegates, are superior courts; and that after sentence, unless defect of jurisdiction be apparent on the proceedings therein, it will not be intended.

Semble, that on a motion for prohibition as above, this Court will look only to the proceedings in the Ecclesiastical Court, and not to affidavits, for the purpose of ascertaining whether the validity of the rate was there questioned. *Ricketts* v. *Bodenham*, 433.

II. Power to plead several pleas. *Pleading*, V. 9.

PROMISSORY NOTE.

See *Bills of Exchange and Promissory Notes.*

PROSECUTION.

In what cases prosecutor pro rege deprived of certiorari. *Certiorari*, I.

PROTEST.

Of non-payment of foreign bill, how notice to be given. *Bills of Exchange and Promissory Notes*, IV.

PUBLICATION.

Whether necessary to a will. *Power*, I.

PURCHASER.

See *Vendor and Vendee.*

QUO WARRANTO.

Application for: what affidavits receivable.

The Court will receive, in support of an application for a quo warranto, the affidavit of a person who is himself estopped from being a relator, if the motion is made by a relator properly qualified; although the complete ground of the application appears only from the affidavit of the party estopped. *Rex* v. *Brame*, 664.

RAILWAY.

Compensation under local act. *Statute*, XLVI.

RATE.

I. Church rate

1. For what purposes it may be made. *Mandamus*, II. 5.
2. Validity of, how Court will judge of. *Prohibition*, I.
3. Liability

3. Liability to.

Held, that the mere fact of a district in a parish having kept up a chapel of its own without coming on the parish rates did not shew a custom in such district to maintain its chapel by rates levied on its own inhabitants. *Craven* v. *Sanderson*, 666. (See whole placitum, *Evidence*, XV. 3.)

4. Power of Ecclesiastical Court to enforce rate. *Prohibition*, I.

5. Mandamus to Justices to enforce payment. *Mandamus*, II. 5.

6. Appeal against order of Justices for payment: to whom notice to be given.

A party appealing against an order of justices for payment of a church rate, under stat. 53 *G.* 3. *c.* 127. *s.* 7., need not give notice of appeal to the justices making the order; it is sufficient to give it to the churchwardens.

And, if such notice to the justices were necessary, service of it upon one of the justices would suffice. *Rex* v. *Justices of Staffordshire*, 842.

II. Poor rate. See *Poor*, I.

RECOGNIZANCES.

Previous to removal of indictment, when enforced. *Certiorari*, IV.

RECORD.

Of Nisi Prius. Entry of pleadings. *Practice*, XX.

REFUSAL.

By party arrested, to name a dwelling-house, what amounts to. *Sheriff*, I. 1.

RELEASE.

Of witness; what will restore competency. *Evidence*, VII. 2. (1.)

REMOVAL.

Of Poor. See *Poor*, VIII.—X.

REPLEVIN.

I. Duty of Sheriff as to ascertaining sufficiency of sureties in replevin bond. *Sheriff*, I. 2.

II. Costs of different issues. *Costs*, I. 3. (2.)

REVERSION.

I. Nature of reversionary interest of trustees of a term. *Mortgage*, IV.

II. For what breaches of contract reversioner may maintain action against tenant in possession. *Landlord and Tenant*, VI.

RIVER.

Nuisance to navigable river, what amounts to. *Nuisance.*

RULE OF COURT.

I. *Hil.* 2 & 3 *G.* 4. Discharge from irregular ca. sa. *Practice*, VIII. 1. (2.) [1.]

II. *Mic.* 2 *W.* 4. I. 74. Costs of different issues. *Costs*, I. 3. (2.)

III. *Mic.* 3 *W.* 4. Form of declaration. *Pleading*, IV. 1.

IV. *Hil.* 4 *W.* 4.

1. Entry of pleadings on Nisi Prius Record. *Practice*, XX.
2. Entry of judgment nunc pro tunc. *Practice*, X. 2.
3. Defence under general issue. *Pleading*, V. 1.

V. *Hil.* 6 *W.* 4.

1. Regulating holidays, 743.
2. Examination and admission of attornies, 744.
3. Re-admission of attorney. *Attorney*, II. 2.

VI. *East.* 6 *W.* 4. Examination of attorneys, 767, 768.

SALE.

See *Vendor and Vendee.*

SCIRE FACIAS.

Plea to: how far it must shew that same defence could not have been pleaded to original action. *Pleading*, V. 10.

SECURITY.

For Costs; time for pleading. *Practice*, XVI.

SEISIN.

Unity of, effect in extinguishing right of way. *Way*, 1.

SESSIONS.

Court of Quarter Sessions.

1. When Court of K. B. will judge as to correctness of inference from facts drawn by Sessions. *Poor*, III. 4. (2.) and VII.
2. Practice of, as to notice of appeals, how far affected by st. 4 & 5 *W.* 4. *c.* 76. *Poor*, IX. I.

SET OFF.

I. Plea of; how far it must shew a larger sum than that against which it professes to be a set off. *Pleading*, V. 4.

II. Whether Court will order stay of proceedings on statement of equitable set off. *Practice*,—XXIII.

SETTLEMENT.

Of poor. See *Poor*, III.—VI.

SHERIFF.

I. Duty of.

1. Taking party to a dwelling-house on arrest.

In an action against the sheriff, for a penalty under stat. 32 *G.* 2. *c.* 28. *ss.* 12, 1, for taking plaintiff, when arrested, within twenty-four hours, to prison, the plaintiff not having refused to be carried to a safe and convenient dwelling-house of her own nomination, defendant pleaded that he informed plaintiff that she might be carried to a safe, &c.; that plaintiff thereupon consented to be carried to the dwelling houge of *L.*; that defendant carried her thither accordingly, and offered to permit her to remain there for the rest of the twenty-four hours, but the plaintiff then requested to be taken to prison:

Held, on motion for judgment non obstante veredicto, a good plea, the circumstances being equivalent to a refusal:

Held, also, issue being joined on the allegation of the consent to go to *L.*'s house, that the consent to be proved was not such consent as a person would give who had the option of being at large; but that the question was, whether plaintiff consented to go to the particular house, as a person would consent, who was obliged to be in confinement somewhere:

Held, also, that the fact of sheriff suggesting *L.*'s house, did not prevent the consent from being free, within the meaning of the issue.

The sheriff is intitled to exercise a reasonable discretion in determining whether a house, nominated by a prisoner under arrest, as a safe and convenient dwelling-house, be a safe house for the custody of the prisoner.

If a prisoner request to be taken to a house for the purpose only of consulting a person there, that is not a nomination of a house within the statute. *Silk* v. *Humphery*, 959.

2. Discretion as to sureties in replevin bond.

In taking sureties in a replevin bond, the sheriff is to exercise a reasonable discretion in deciding upon their sufficiency; and, in an action for taking insufficient sureties, it is for the jury to decide whether he has used such discretion or not.

The sheriff or replevin clerk is not bound to go out of the office to make inquiries; but, if the sureties are unknown to him, he ought to require information, beyond their own statement, as to their sufficiency.

Where persons of respectable appearance are brought to the replevin clerk as sureties by the attorney's clerk on behalf of the party replevying, their circumstances being unknown both to the attorney's clerk and to the replevin clerk, and the latter causes the sureties to make affidavit in detail as to their sufficiency, with which he is satisfied, and an action is afterwards brought against the sheriff for taking insufficient sureties, the jury may properly find that the inquiry made does not excuse the sheriff.

On the trial of such an action, the bond, but not its amount, being admitted on the pleadings, evidence was gone into on both sides, upon the question whether or not, under the circumstances above stated, the replevin clerk had used reasonable caution. The replevin bond was referred to by both parties during the trial, and was stated to have been taken in double the value of the goods; and it was in court, ready to be produced; but, by an oversight the plaintiff did not formally put it in, nor was it expressly noticed as a part of the evidence in the cause, till a verdict

dict had been given for the plaintiff. The Judge stating to the Court that he considered it as in effect put in: Held, on motion to enter a verdict for nominal damages for want of proof of the bond, or other evidence of the value of the goods, that the bond must be considered as having been in effect proved at the trial.

In an action against the sheriff for taking insufficient sureties in a replevin bond, the penalty of the bond is the limit of damages. *Jeffery* v. *Bastard*, 823.

3. Proceeding to sale under writ of execution. *Post*, VI.

II. When entitled to indemnity from execution creditor. *Post*, VI.

III. What discretion sheriff has as to determining house to which to take party on arrest. *Antè*, I. 1.

IV. What amounts to consent and refusal by party arrested to name a dwelling-house to which to be taken. *Antè*, I. 1.

V. What amounts to a nomination of a dwelling-house by party arrested. *Antè*, I. 1.

VI. When Court will interfere for his protection under Interpleader Act.

Under *s.* 6. of the Interpleader Act, 1 & 2 *W.* 4. *c.* 58., the Court will not make a rule for the protection of sheriff who has levied under a fi. fa., merely because a partner of the debtor has given notice to the sheriff to quit possession on the ground that the goods are partnership property, and that the debtor has no beneficial interest in them, being indebted to the firm beyond the amount of his share in the effects.

The sheriff's duty is to sell the share, though he may not be able to ascertain the amount of actual interest.

But the Court will, in the above case, interfere under the act for the sheriff's protection, if the creditor disputes the partnership.

And where the creditor, having appeared under the interpleader rule and not contested the partnership, whereupon the rule was dismissed, afterwards refused to admit it, and ruled the sheriff to return the writ, the Court enlarged the latter rule till the creditor should indemnify the sheriff. *Holmes* v. *Mentze*, 127.

VII. Money paid to, on arrest, when recoverable back.

A certificated bankrupt, being arrested on a ca. sa. for a debt proveable under the commission, paid the money under a protest, stating his bankruptcy and certificate, and warning the sheriff that he should apply to the Court to have the money paid back:

Held, that this was not such a payment of money under legal process, with knowledge of the facts, as precluded the bankrupt from recovering back the money. *Payne* v. *Chapman*, 364.

VIII. Damages in action against, for taking insufficient sureties. *Antè*, I. 2.

SIMILITER.

Omission of, in record, effect of.

To an action of trespass for false imprisonment, defendant pleaded leave and licence; to which the plaintiff replied de injuriâ, concluding to the country, without an "&c.;" and no issue was joined on this. There were also pleas of justification, under claims to detain the plaintiff till he made certain payments, which pleas were replied to, and issues joined on the replication: Held, that the defendant could not take advantage of the informality, after trial and verdict for the plaintiff. *Spencer* v. *Hamerton*, 419.

STAMP.

I. Ad valorem stamp, under st. 55 *G.* 3, *c.* 184.; how value estimated. *Assumpsit*, II. 2.

II. On an instrument already stamped as, and purporting to be, an instrument of a different kind.

An instrument which, in other respects, was a promissory note, and had been properly stamped as such before making, contained in the body of it a memorandum that the maker had deposited certain title deeds with the payee as a collateral security. After it was made, it was stamped with a proper mortgage stamp on payment of the penalty.

Held, that this was an assignable promissory note under stat. 3 & 4 *Ann.* *c.* 9. *s.* 1., and that it might be sued on by an indorsee, though the mortgage stamp was put on after the making, and

and though there was no assignment stamp.

If an instrument containing a mortgage be also a promissory note, it may still be stamped with a mortgage stamp, after the execution, provided it has a promissory note stamp on it at the time it is executed. *Wise* v. *Charlton*, 786.

III. Evidence relating to.

1. When document not produced will be presumed to be properly stamped. *Assumpsit*, II. 2.
2. How far unstamped instrument may be referred to, and incorporated with stamped one. *Landlord and Tenant*, I.
3. Agreement for what purposes admissible without stamp.

Under Lord *Tenterden*'s act, 9 *G.* 4. *c.* 14. *s.* 8., the following memorandum, — "I acknowledge to owe *M.* 56*l.*, which I agree to pay him as soon as my circumstances will permit," — is exempt from stamp duty, as a writing made necessary by that statute, provided it be put in for the mere purpose of barring the Statute of Limitations, the debt itself being proved by other evidence. *Morris* v. *Dixon*, 845.

4. Old lease whether admissible to prove terms of subsequent holding without stamp. *Evidence*, XII.

STATUTE.

FIRST: Decisions on particular public and general statutes.

I. 43 *Eliz. c.* 2. (Poor) *s.* 19., how far affected by new rules of pleading. *Pleading*, V. 1.

II. 43 *Eliz. c.* 6. (Costs.) Judge's certificate, how far conclusive. *Costs*, VI.

III. 21 *Jac.* 1. *c.* 16. (Limitation of actions.)

1. Unliquidated damages.

Assumpsit for unliquidated damages is within the saving clause in sect. 7. of the Statute of Limitations, 21 *Jac.* 1. *c.* 16. *Piggott* v. *Rush*, 912. (See remainder of placitum, *Post*, III. 2.)

2. Imprisonment, what bars operation of statute.

If a party, who is in prison when the cause of action accrues, commences an action after the six years have elapsed, but during the continuance of the imprisonment, the operation of the statute is barred by the saving clause in sect. 7. *Piggott* v. *Rush*, 912. (See remainder of placitum, *Antè*, III. 1.)

3. Plea under, how far it must confess cause of action. *Pleading*, V. 3.

IV. 13 & 14 *Car.* 2. *c.* 12. (Poor.) What constitutes a "coming to inhabit" within a parish. *Poor*, VII.

V. 3 & 4 *Ann. c.* 9. (Promissory notes). What constitutes a note. *Stamp*, II.

VI. 4 *Ann. c.* 16. (Pleading several matters.) Costs of issues how affected by Gen. Rule, Hil. 2 *W.* 4. I. 74. *Costs*, I. 3. (2.)

VII. 8 *Ann. c.* 9. (Indenture of Apprenticeship.)

1. Execution of Indenture. *Poor*, III. 3.
2. What must be stated in Indenture. *Poor*, III. 1.

VIII. 7 *G.* 2. *c.* 20. (Redemption of mortgages.) Re-conveyance of mortgaged property to mortgagor. *Mortgage*, V.

IX. 11 *G.* 2. *c.* 19. Landlords and Tenants.) What constitutes a hereditament within sec. 14. *Landlord and Tenant*, XI.

X. 17 *G.* 2. *c.* 3. (Poor rates.)

1. Inspection of poor rates.

(1.) Who entitled to.

In debt for a penalty, on stat. 17 *G.* 2. *c.* 3. *s.* 3., for not permitting the inspection of a poor rate, the declaration described the plaintiff as "an inhabitant of the parish:"

Held, that this sufficiently shewed that he was a party aggrieved.

The declaration described the defendant as "assistant overseer" in the parish, and alleged that he, as such assistant overseer, had the rate in his possession: Held, that this sufficiently shewed his duty and liability.

Plea, that the plaintiff had no right to inspect the rate, it not being a subsisting rate, or such a rate as he was entitled to inspect:

Held, bad on general demurrer.

Conceded, that no answer was furnished by pleas stating facts which shewed that the time for appealing against the rate had elapsed before the request to inspect was made. *Batchelor* v. *Hodges*, 592.

(2.) To

(2.) To what rates applicable. *Antè*, (1.)
2. What sufficient averment on pleadings of party being agrieved. *Antè*, 1. (1.)

XI. 32 *G.* 2. *c.* 28. (Lords' Act.)
1. Service of notice under. *Notice*, IX. 1. (1.)
2. Taking party arrested to a dwelling house. *Sheriff*, I. 1.

XII. 5 *G.* 3. *c.* 46. (Stamps.) Execution of Indenture. *Poor*, III. 3.

XIII. 13 *G.* 3. *c.* 78. (Highways.)
1. In what it differs from st. 55 *G.* 3. *c.* 68. *Highway*, VII. 3. (2.)
2. Order of Justices under *s.* 17., what it must state. *Highway*, VII. 3. (2.)
3. Surveyor's assessment, under *ss.* 30. and 45., how to be pleaded. *Pleading*, IX.

XIV. 35 *G.* 3. *c.* 101. (Removal of paupers.) Expenses of pauper after suspended order of removal. *Poor*, II.

XV. 41 *G.* 3. *c.* 109. (Inclosure.) Liability to repair highway. *Highway*, V. 1.

XVI. 43 *G.* 3. *c.* 46. (Frivolous arrests.) Defendant's costs: what will be presumed after verdict. *Pleading*, VIII. 1.

XVII. 48 *G.* 3. *c.* 123. (Imprisonment for small debts.) Discharge of prisoner. *Execution*, 2.

XVIII. 50 *G.* 3. *c.* 117. (Public salaries and pensions.) Superannuation allowance under. *Mandamus*, II. 1.

XIX. 53 *G.* 3. *c.* 127. (Church rates.)
1. Appeal against order for payment of rate, to whom notice to be given. *Rate*, I. 6.
2. Enforcing payment of rate. *Mandamus*, II. 5.; *Prohibition*, I.

XX. 55 *G.* 3. *c.* 68. (Highways.) What order of Justices for stopping up highway must state. *Highway*, VII. 5. (2.) VII. 4.

XXI. 55 *G.* 3. *c.* 184. (Stamp.) Stamp on assignment. *Assumpsit*, II. 2.

XXII. 56 *Geo.* 3. *c.* 139. (Parish apprentice.) Notice previous to binding of apprentice. *Poor*, III. 2. (1.)

XXIII. 59 *G.* 3. *c.* 12. (Poor.) Effect of, in vesting parish property. *Landlord and Tenant*, V.

XXIV. 3 *G.* 4. *c.* 113. (Public salaries and pensions.) Superannuation allowance. *Mandamus*, II. 1., II. 2.

XXV. 6 *G.* 4. *c.* 16. (Bankrupts.)
1. Sec. 72.
(1.) Reputed ownership. *Vendor and Vendee*, II.
(2.) Order and disposition of bankrupt. *Vendor and Vendee*, I.
2. Sec. 82.
(1.) What payments protected by. *Bankrupt*, I.
(2.) What sufficient notice within. *Bankrupt*, I.

XXVI. 7 *G.* 4. *c.* 46. (Bank of England.) How far bank identified with transactions of branch banks. *Bankrupt*, I.

XXVII. 7 *G.* 4. *c.* 37. (Insolvent debtors.) Recovery of proceeds of illegal execution. *Pleading*, I. 5. (4.) [2.]

XXVIII. 9 *G.* 4. *c.* 14. (Limitation of actions.)
1. What amounts to part payment.
Where it has been agreed between debtor and creditor that the latter shall receive goods in reduction of his demand, the delivery of such goods operates as a payment within stat. 9 *G.* 4. *c.* 14. *s.* 1., to bar the Statute of Limitations. *Hooper* v. *Stephens*, 71. See also *Evidence*, XV. 2. (2.)
2. Memorandum in writing; how far stamp necessary. *Stamp*, III. 3.

XXIX. 9 *G.* 4. *c.* 31. (Offences against the person.) Form of conviction under. *Conviction*, I.

XXX. 1 *W.* 4. *c.* 18. (Settlement by renting tenement.) Occupation and payment of rent. *Poor*, V. 1.

XXXI. 1 *W.* 4. *c.* 21. (Prohibition and Mandamus.)
Power to plead several pleas in prohibition. *Pleading*, V. 9.

XXXII. 1 & 2 *W.* 4. *c.* 32. (Game.) Conviction under. *Conviction*, II.

XXXIII. 1 & 2 *W.* 4. *c.* 58. (Interpleader.) See *Sheriff*, VI.; *Interpleader*.

XXXIV. 2 *W.* 4. *c.* 39. (Uniformity of process.) Whether it applies to causes from inferior Courts. *Pleading*, IV. 1.

XXXV. 2 & 3 *W.* 4. *c.* 71. (Prescription.)
1. Construction

1. Construction of sects. 2 & 5, as to "enjoyment as of right." *Pleading*, VI.
2. How licence to a plea of 40 years enjoyment shall be pleaded. *Pleading*, VI.
3. What may be given in evidence to shew,
   (1). User. *Evidence*, IX. 2.
   (2). Interruption of user. *Pleading*, VI.

XXXVI. 3 & 4 *W.* 4. *c.* 40. (Irish paupers.) Removal of pauper. *Poor*, VIII.

XXXVII. 3 & 4 *W.* 4. *c.* 42. (Amendment of the Law.)
1. Who rendered competent witnesses by sect. 26. *Evidence*, VII. 2. (1.)
2. Defence under general issue, when not affected by rules of Court. *Pleading*, V. 1.

XXXVIII. 4 & 5 *W.* 4. *c.* 76. (Poor.)
1. How far applicable to Irish pauper. *Poor*, VIII.
2. Notice and grounds of appeal, under sects. 79 & 81. *Poor*, IX. 1.

XXXIX. 5 & 6 *W.* 4. *c.* 33. (Removal of indictments.) Removal by one of several defendants; its effect. *Certiorari*, IV.

XL. 5 & 6 *W.* 4. *c.* 59. (Cruelty to animals.) What is a matter done within.

A hired driver of a cabriolet having brought home the horse, apparently much ill-used by him, the owner's son (in the owner's absence) called in a policeman, and told him that the driver had ill-used the horse. The policeman said that, if the complainant charged the driver with cruelty to the horse, he would take him into custody; the complainant said, "I do;" and the policeman apprehended the driver, under stat. 5 & 6 *W.* 4. *c.* 59. *s.* 9.

Held, that the complainant must be considered, not as a party giving information to the officer, in consequence of which he was arrested, but as a principal causing the arrest to be made; and that he was not entitled to notice of action, which the statute requires to be given to persons sued for anything done in pursuance of it. *Hopkins* v. *Crowe*, 774.

XLI. 5 & 6 *W.* 4. *c.* 76. (Municipal Corporations.)
1. Right of burgesses to inspect voting papers. *Corporation*, III.
2. Effect of, on jurisdiction of Justices.

By stat. 2 & 3 *W.* 4. *c.* 64. *s.* 56. sched. (O.) 30., *Clifton* is made a part of the parliamentary borough of *Bristol*, which is a county of itself. Except so far as that act operated, it was in the county of *Gloucester*: Held that, after the passing of the Corporation Act, 5 & 6 *W.* 4. *c.* 76. *ss.* 7, 8, the *Gloucestershire* justices had no longer the power to make an order for diverting a footway in *Clifton*, their jurisdiction, in such cases, being transferred to the justices of *Bristol*. *Rex* v. *Justices of Gloucestershire*, 689.

Secondly: Decisions on local acts.

XLII. River *Nene* navigation.

By one section of an act of parliament, it was enacted, that money allowed by commissioners of a navigation to their clerk, appointed by them, should be paid by the proprietors of the tolls on the navigation, in certain proportions. A subsequent section enacted that, if any proprietor should neglect or refuse to pay on demand made either of him or his agent, the money might be recovered by action of debt, &c., *with double costs*, in the clerk's name, against such proprietor, or, if he could not be found, against his agent; or otherwise the sum might be levied by distress upon the goods of the proprietor, or, if no such goods could be found, on the goods of his agent.

The clerk obtained a verdict in debt against a proprietor, on an issue of nil debet, but had averred no demand in the declaration:

Held, that the right of action was given by the two sections conjointly: that the demand, if necessary to the action, must be presumed after verdict; and, therefore, that the declaration must be considered as framed, and the verdict recovered, under both sections, and that the plaintiff was entitled to double costs. *Tobbits* v. *Yorke*, 134.

XLIII. *Hatfield* Inclosure Act, construction of as to highways. *Highway*, V. 1.

XLIV. Stopping up roads under Easthampstead Inclosure Act. *Highway*, VII. 4.

XLV. *White-*

XLV. *Whitechapel* paving: rating of tolls.

The lord of a manor, as owner of a market in the parish of *W.*, was entitled to part of certain market tolls in *W.* By an act for better paving part of *W.*, authority was given to levy rates for the purposes of the act; and by the same act the market tolls were made payable to commissioners, who were to collect them and to pay over to the lord a part equivalent to his former dues. There was no clause in the statute making the lord rateable in respect of these payments.

By a subsequent local public act, for the relief of the poor in *W.*, for cleansing, lighting, and watching, and for repair of highways, in *W.*, and for repairing the parish church, it was enacted (sect. 53.) that certain rates should be laid "upon all and every the person and persons who do and shall inhabit, *hold, occupy, possess, or enjoy* any land, house, shop, warehouse, or other building, *tenement or hereditament*; that is to say," one rate for the relief of the poor, one for repair of the church, and a third for cleansing and lighting streets, and watching and repairing highways within such parts of the said parish as are not within certain liberties; such last-mentioned rate to be a pound rate (not exceeding a certain proportion) "*upon or according to the annual rent or value of all messuages, lands, tenements, and hereditaments as shall be held or occupied within such parts of the said parish as are not within the said liberties.*" By a subsequent section, the rates for the poor were to be levied and recovered in the same manner as poor rates are directed to be levied and recovered by stat. 43 *Eliz. c.* 2.

In several subsequent clauses of this act, and in the rating clause and a previous one of the paving act, the words "tenement" and "hereditament" were used with reference to corporeal hereditaments solely.

Held, that, in sect. 53. of the more recent act, "hereditaments," in the clause fixing the pound rate, meant such as were local and corporeal only; and that "hereditament" in the prior clause of the same section must be construed in the same sense: and therefore that the payments to the lord in lieu of toll were not rateable under this act. *Colebrooke* v. *Tickell*, 916.

XLVI. Compensation under railway act.

By the *Liverpool* and *Manchester* Railway Act it was provided that the purchase money to be given by the Railway Company for lands, &c., taken, and the compensation they were to make for damage to lands, &c., and for detriment, injury, damage, loss, inconvenience, or prejudice, sustained by owners and occupiers, should be ascertained, in case of disagreement, by a jury, who should assess compensation for the damages to be sustained by any person being owner or occupier of or interested in such lands, &c., for the detriment, &c., which should accrue to him by reason of the making of the railway, or of the execution of the company's power; such damages to be settled distinctly from the value of the lands. And every tenant at will, lessee for a year, and other person in possession of lands, &c., through which the railway was intended to pass, not having any greater interest than as tenant at will or lessee for a year, was to give up possession at six months' notice; but, where such tenant was required to give up possession before the expiration of his term or interest, the company were to make compensaton for the value of the unexpired term or interest, to be settled, if necessary, by a jury.

The company gave notice as above, to a party whose lease had been several times renewed for terms of seven years, and whose landlord, at the time of the last renewal, had declined to renew for fourteen years, but assured the tenant that he would not be turned out at the end of the seven. The tenant afterwards laid out money in improvements. During the seven years the landlord sold his reversion to the company, and died.

Held, that the tenant had no interest for which the company were bound to make compensation under the act. *Rex* v. *Liverpool and Manchester Railway Company*, 650.

STAY OF PROCEEDINGS.

Equitable jurisdiction of Court. *Practice*, XXII.

STOPPAGE IN TRANSITU.

See *Vendor and Vendee*, II.

SUPERANNUATION.

Allowance granted by Lords of Treasury; how far party has a vested interest in. *Mandamus*, II. 1., II. 2.

SURETIES.

I. In replevin bond; discretion of Sheriff. *Sheriff*, I. 2.

II. Action against Sheriff for taking insufficient sureties; what damages may be given. *Sheriff*, I. 2.

SURVEYOR.

Of Highway.

1. Order of Justices to Surveyor to sell land to himself. *Highway*, VII. 3. (2.)
2. Books of, who entitled to, on his quitting office. *Highway*, VIII.

TAXATION.

I. Of Attorney's bill. Proceedings to be taken by attorney. *Attorney*, IV.

II. Of costs; power of Court to interfere with. *Costs*, I. 1.

TENANT.

See *Landlord and Tenant*.

TENEMENT.

Settlement by renting. *Poor*, V.

TERMINI.

Of highway: what strictness of description necessary in pleading. *Highway*, III.

TIME.

For pleading, after praying oyer. *Practice*, XVI.

TOLLS.

Rating of, under local act. *Statute*, XLV.

TREASURY.

Lords of.

1. Legal liability to pay over money received for a party under a vote of Parliament. *Mandamus*, I. 1.
2. Power to revoke superannuation allowance. *Mandamus*, II. 1., II. 2.
3. Mandamus to. See *Mandamus*, I. 1., II. 1. and 2.

TRIAL, NEW.

I. On improper admission of evidence.

Where improper evidence is received, and a verdict given for the party adducing it, the Court will grant a new trial, although there be other evidence to the same point in favour of the same party; unless they see clearly that the improper evidence could not have weighed with the jury, or that the verdict, if given the other way, would have been set aside as against evidence. *Baron de Rutzen* v. *Farr*, 53. (See remainder of placitum, *Evidence*, III.)

II. Misdirection of Judge at trial. *Pleading*, V. 1.

III. Verdict against evidence. *Pleading*, V. 1.

IV. What presumption of law to be stated by Judge to jury. *Common*.

TROVER.

I. For what tenant may maintain trover against landlord at expiration of tenancy. *Landlord and Tenant*, XII.

II. What amounts to a conversion. *Landlord and Tenant*, XII.

TURNPIKE ROAD.

When incomplete, liability to repair. See *Highway*, V. 2.

VARIANCE.

Between pleading and evidence. *Bond*, I.; *Highway*, III.

VENDOR AND VENDEE.

I. When property in goods passes to Vendee.

P. contracted with a ship-builder to build him a ship for a certain sum, to be paid by instalments as the work proceeded; the first instalment when the vessel was rammed, the second when she was timbered, &c. An agent for *P.* was to superintend the building. The vessel was built under such superintendence, all the materials being approved by the agent before they were used. The builder became bankrupt before the ship was completed. Afterwards

wards the assignees completed the ship. All the instalments were paid or tendered. In an action of trover by *P.* against the assignees for the ship: Held, that, on the first instalment being paid, the property in the portion then finished became, by virtue of the above contract, vested in *P.*, subject to the right of the builder to retain such portion for the purpose of completing the work and earning the rest of the price; and that each material subsequently added became, as it was added, the property of *P.* as the general owner.

Held, further, that under the above circumstances the ship did not pass to the assignees as having been in the possession, order, or disposition of the bankrupt by consent of the true owner, within stat. 6 *G.* 4. *c.* 16. *s.* 72. *Clarke* v. *Spence*, 448.; *Post*, II.

II. Lien of Vendor.

A party having goods in his own warehouse at *Liverpool* sold them, and gave the following delivery order to the vendee:—"We hold to your order 39 pipes," &c., "rent free to 29th *November* next." The goods remained in the same warehouse unpaid for till the vendee became bankrupt. In an action of trover for the goods by the assignee, evidence was given that, by the usage of *Liverpool*, goods sold while in warehouse are delivered by the vendor handing to the vendee a delivery order; and that the holder of such order may obtain credit with a purchaser as having possession of the goods.

Held that, as between the original vendor and vendee, the right of lien was not divested by giving such delivery order.

Also, that the bankrupt had not possession of the goods as reputed owner, with the consent of the true owner, within the meaning of stat. 6 *G.* 4. *c.* 16. *s.* 72. *Townley* v *Crump*, 58.

III. Bill of parcels, how far a warranty. *Warranty.*

IV. How far auctioneer agent of Vendor and Vendee.

Whether an auctioneer be the agent of both purchaser and seller depends upon the facts of the particular case.

Therefore, where a party, to whom money was due from the owner of goods sold by auction, agreed with the owner, before the auction, that the goods which he might purchase should be set against the debt, and became the purchaser of goods, and was entered as such by the auctioneer, it was held that he was not bound by the printed conditions of sale, which specified that purchasers should pay a part of the price at the time of the sale, and the rest on delivery. *Bartlett* v. *Purnell*, 792.

V. What relation between vendor and vendee arises on non-fulfilment of conditions of sale. *Pleading*, II.

VENUE.

How far conclusive as to place of trial.

An indictment for misdemeanor was preferred at the Central Criminal Court; the marginal venue was "Central Criminal Court;" in the body of the indictment the facts were stated to have taken place "at the parish of *St. Mary Lambeth*, *Surrey*, within the jurisdiction of the said Court." The indictment was removed by certiorari.

Held, that the trial must be at the assizes for *Surrey*. *Rex* v. *Connop*, 942.

VERDICT.

I. What amounts to a verdict of guilty, on indictment for nuisance. *Nuisance.*

II. Right of Judge to discharge Jury from giving verdict.

In trespass quare clausum fregit, issues were joined on three pleas: 1st, of a public carriage way; 2ndly, of a public bridle way; 3rdly, of a public foot way. The jury found a verdict for the plaintiff on the first issue, and for the defendant on the third; and the Judge, without the consent of the plaintiff, discharged the jury from giving a verdict on the second issue.

The Court granted a new trial, although the plaintiff, at the beginning of the trial, had agreed that the damages, if any, should be merely nominal. *Tinkler* v. *Rowland*, 868.

III. Entry of, on second demise in ejectment after execution on first. *Ejectment*, III.

IV. What will be presumed after verdict. *Pleading*, VIII. 1.; *Statute*, XLII.

V. Against evidence, when ground for new trial. *Pleading*, V. 1.

VI. Judgment non obstante veredicto. *Pleading*, VIII. 2.

VESTED INTEREST.

I. Of naval officer in his half-pay. *Mandamus*, II. 5.

II. Of grantee of superannuation allowance by Lords of Treasury. *Mandamus*, II. 2.

UMPIRE.

Appointment of, by arbitrators, how to be made. *Award*, I.

WARRANTY.

What amounts to.

In assumpsit for breach of a warranty of pictures, it was proved, among other things, that the defendant, at the time of the sale, gave the following bill of parcels: — "Four pictures, Views in *Venice*, *Canaletto*, 160*l*." The Judge left it to the jury upon this and the rest of the evidence, whether the defendant had contracted that the pictures were those of the artist named or whether his name had been used merely as matter of description, or intimation of opinion.

The jury found for the plaintiff, saying that the bill of parcels amounted to a warranty:

Held, that the question had been rightly left to the jury, and that the verdict was not to be disturbed. *Power* v. *Barham*. 473.

WAY.

Right of.

1. By what words in a conveyance it will pass.

Estates *A.* and *B.*, formerly distinct, became vested in co-parceners. Before that time, a right of way had been enjoyed from *A.* over *B.*, and, after the unity of seisin, the way always continued to be used. The parceners, for the purpose of making partition, conveyed to a releasee to uses the messuages, tenements, lands, &c. (of which the estates consisted), and all houses, out-houses, ways, easements, &c., to the said several messuages or tenements, lands, &c., belonging or appertaining, or *therewith usually held, used, occupied, or enjoyed:* to have and to hold the messuages, &c. called *A.*, with the buildings, lands, &c. thereunto belonging, *and their appurtenances*, to the releasee to the use of *S.* in fee; habendum, as to estate *B.*, in similar terms with respect to the parcels, to the releasee to his own use in fee, in order that he might become tenant to the præcipe in a recovery.

Held, that the deed sufficiently shewed an intention that a right of way, (which way was admitted to have been used up to the time of the deed,) from the high road over *B.* to *A.* and back, for the convenient use of *A.*, by the occupiers of *A.*, should pass to the uses limited as to *A.*

That by the word "appurtenances," in the habendum as to *A.*, interpreting that clause with reference to the other parts of the deed, the way in question did pass.

And that the releasee to uses, having no estate in *A.*, had not such a seisin of the soil as would extinguish the right of way by unity of seisin. *James* v. *Plant*, 749.

2. By enjoyment under stat. 2 & 3 *W.* 4. *c.* 71.; pleading and evidence relating to. See *Pleading*, VI.

3. Construction of words, *enjoyment as of right*, in prescription act. *Pleading*, VI.

4. Evidence in proof of. *Pleading*, VI.; *Evidence*, IX. 2.

5. When extinguished by unity of seisin. *Antè*, 1.

See further, *Highway*.

WILL.

I. Publication, what amounts to, and whether necessary. *Power*, I.

II. Attestation.

1. Effect of general attestation. *Power*, I.

2 Proof of. *Power*, I.

III. What evidence admissible to explain ambiguity. *Devise*, II.

IV. Death of devisee in life-time of testator, its effect. *Devise*, I.

V. What operates as a revocation of a will. *Devise*, I.

WITNESS.

I. Attesting.
1. Who considered. *Evidence*, II. 1.
2. Proof by, when dispensed with. *Power*, I.; *Evidence*, II. 1.

II. Competency of. See *Evidence*, VII.

WRIT.

Insufficiency of description in, its effect. *Judge*, III. 2.

END OF THE FOURTH VOLUEM.

LONDON:
Printed by A. SPOTTISWOODE,
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